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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Carl Edwin Fagerman & Bertha Louise Fagerman
Petitioner(s)

v.

Michigan Department of Transportation
Respondent(s)

On Petition For Writ of Certiorari
To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Bertha Louise Fagerman
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108 pp

QUESTIONS PRESENTED FOR REVIEW

1. What is the nature of the rights, privileges and immunities conveyed by the United States from the public lands in land patents and warrants, specifically prior to March 5, 1875, as they relate to Michigan's sovereign power of eminent domain?

2. Is the Michigan Uniform Condemnation Procedures Act unconstitutional?

3. How far can our "due process" rights and the laws of our state be bent by the Michigan Department of Transportation under the power of eminent domain while remaining constitutional?

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, Anita Louise Fagerman and Mark Raymond Fagerman are parties to the case.

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The constitutionality of an Act of Congress is being drawn into question, and therefore the Solicitor General is a party.

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OPINIONS AND JUDGMENTS BELOW

The order of the Michigan Supreme Court is not reported. The opinion of the Michigan Court of Appeals is unpublished. All orders are reproduced in appendix A.

JURISDICTION

The opinion of the Michigan Court of Appeals was issued on July 26, 2002. The Michigan Court of Appeals denied the petition for rehearing on September 11, 2002. The order of the Michigan Supreme Court was on February 28, 2003. The Michigan Supreme Court denied the petition for reconsideration on May 30, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

28 USC § 2403(a) may apply because the constitutionality of an Act of Congress is drawn into question, and neither the United States nor any federal department, office, agency, officer, or employee is a party.

CONSTITUTION & STATUTES INVOLVED

US CONST. art. I, § 10, cl. 1
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1980 PA 87
Warrant 40653
Warrant 96989
Patent 4688
Patent 4231
April 24, 1820 Act of Congress
March 3, 1855 Act of Congress
March 5, 1875 Act of Congress
August 1, 1888 Act of Congress

STATEMENT OF THE CASE

The Uniform Condemnation Procedures Act[1] (UCPA) was codified by the Michigan Legislature and enacted in 1980 in order to bring about a common and consistent method of condemning private property in the territorial limits of Michigan. It's provisions were invoked in 1996 by the Michigan Department of Transportation (MDOT), a state agency, acting under the Constitutionally created Transportation Commission, to take our property from us so as to change the location of highway US 131 in and around the city of Cadillac and specifically through Haring Township in Wexford County. Roughly 38.53 acres in the middle of our 232 acre farm was permanently taken from us, while a thin, yet long, 1.87 acres along our road (encompassing nearly our entire southern boundary) was temporarily taken from us for four years. Four of us resided on our property for several years prior to, and during, this action; Carl and Bertha are owners of the real property, while Mark and Anita are their children and reside there and help run the farm operation. Due to federal funding issues, the case did not proceed forth in timely fashion until 1999, at which point in time a jury trial established the amount of just

[1] 1980 PA 87, MCL 213.51 *et seq.*, MSA 8.265(1) *et seq.*

compensation to be $237,000.00. The lower court's order conditioned our receipt of this money upon our deliverance of a signed W-9, and to date, we refuse to provide the signed document[2] and the amount of just compensation has not yet been delivered to us. Following is a sketch of the taking:

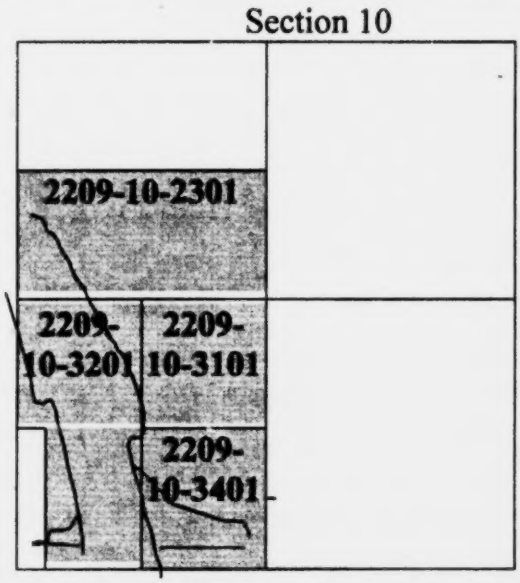

Figure 1: Permanent taking runs diagonally to the NW. Temporary 1.87 acre taking on southern portion of property. Gray area is our property prior to any taking.

On appeal, we argued that the lower court lacked subject matter jurisdiction and the court abused its discretion. The Court of Appeals heard oral arguments on our case, even after numerous motions were made by both parties to dissolve the matter without formal evaluation[3]. In its July 26, 2002 unpublished opinion, the Court of Appeals held that the appeal aimed at challenging the validity of the court

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[2] Such a document is coercive in nature and forbidden per MCL 213.74, MSA 8.265(24).

[3] MDOT immediately filed a motion to affirm and a motion for partial dismissal. We filed two motions for peremptory reversal and a motion for summary disposition.

proceedings and was statutorily limited for review[4] and it did not find an abuse of discretion. We moved for rehearing and asserted that no order was entered upholding the validity of the action (and thereby did not invoke any statutes of limitation for an appeal), our land patents are contracts and cannot be impaired, and the Court is bound to follow the rule of law. Our motion was denied.

In our application for leave to appeal to the Michigan Supreme Court we raised, for the first time, the claim that the UCPA is unconstitutional. The Court denied both our appeal and our motion for reconsideration.

In 2000, MDOT again initiated another condemnation proceeding to extend the time for the temporary 1.87 acre taking of our property for at least another two years[5]. To date, the highway has been constructed and opened to the public. The 2000 court proceeding is on appeal, and MDOT has not yet formally removed its claim to our 1.87 acres of property.

REASON FOR GRANTING WRIT

This case presents an important issue of property ownership under the Property Clause, US CONST. art. IV, § 3, and specifically requires construction of the nature of "all rules and regulations" imposed by Congress on the once Public Lands. This specific construction has never been adjudicated in the federal courts and has been overlooked on other matters such as jurisdiction,[6] treaties[7], land

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[4] MCL 213.56(6), MSA 8.265(6)(6).

[5] MDOT reserved the right to automatically extend the time of the taking "from year to year" as needed; this, we asserted, violates the statutes of fraud. The award was $9,500.00.

[6] *Joy v City of St. Louis*, 26 S Ct 478, 201 US 332 (1906) holds that "the mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises." In *Oneida Indian Nation v County of Oneida*. 414 US 661, 676, 94 S Ct 772, 781, 39 L Ed 2d 73 (1974) this Court narrowly ruled that a patent with a continuing federal interest did invoke the federal-question jurisdiction

descriptions[8], and grants to states[9]. This case also presents an important question involving the constitutionality of Michigan's Uniform Condemnation Procedures Act, 1980 PA87. Lastly this case presents an important question involving a state's rights to overpower the statutes in force when addressing an issue involving the power of eminent domain. All questions are ripe for this Court's review.
One of the questions presented—what is the nature of patents and warrants issued prior to the March 5, 1875 Act of Congress that empowered states to condemn private and public property—itself implicates a number of connected and important questions warranting this Court's review. The first of these is whether the United States can selectively chose when and if the power of eminent domain is to pass to the states respecting public land that is being patented to private parties under the Properties Clause of the Constitution. Relatedly is the determination of what the nature of all patents and warrants are that were issued prior to this Act; Also related is the issue relating to patents that are issued with "all rights, privileges, immunities, and appurtenances of

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and once a *"patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts."*

[7] *Mitchel v US*, 34 US 711 (1835) looked to the treaties between Florida Indians and Spanish king remaining in force over territory ceded to the US and were binding on the US by obligations they had assumed by Louisiana Treaty between France and the US. *US v King*, 48 US 833 (1849) looked to the April 30, 1803 treaty with Spain that reserved inhabitants of Louisiana with the full enjoyment of their property.

[8] In *People v Broedell*, 112 NW2d 517, 365 Mich 201 (1961) the Michigan Supreme Court ordered the defendant to revise the record and show the land patent and later remanded the case for an evaluation of the patent.

[9] *Dubuque & PR Co v Litchfield*, 64 US 66 (1859) looked to the legal description of the land actually granted under the May 15, 1856 Act of Congress land granting land to the State of Iowa to aid in the construction of certain railroads. *US v Union Pac R Co*, 77 S Ct 685, 353 US 112 (1957)

whatsoever nature" and just whether the property is immune from a state's power of eminent domain. This Court's intervention is warranted to create consistency and coherence to the law in this area.

The second question concerns the constitutionality of the state of Michigan's procedures for condemning private property. In itself, there are a myriad of issues involved. The last question presented concerns a state's right to impose strict laws upon its citizens, while loosely imposing those same laws upon itself.

The Court should grant the petition in this case because opportunities to review these important issues do not often arise.

I. THE COURT SHOULD RESOLVE THE NATURE OF THE RIGHTS, PRIVILEGES AND IMMUNITIES PASSED WITH LAND PATENTS AND WARRANTS ISSUED PRIOR TO MARCH 5, 1875.

The laws respecting the taking of private property within the territory of Michigan are derived from Virginia's 1783 Act of Cession (Statute at Large 326) that was executed March 1, 1784. As a condition to ratifying the Articles of Confederation, Virginia stipulated that the Northwest Territory, under its dominion, would be ceded to the United States "for the use and benefit of" the United States, and the said territory was required to be "faithfully and bona fide disposed of for that reason". All new states formed from the territory were to be admitted into the Union "having the same rights of sovereignty, freedom and independence of the other states". Virginia thereby ceded "all right, title, claim, as well of soil as jurisdiction" to the United States and empowered the federal government to control the entire territory in trust; The United States thereby became trustee of the property encompassing our current state of Michigan. The ceding of this property was done to provide a fund from which to work

for the Union's common benefit. *Dred Scott v Sandford*, 60 US 393, 434 (1856). *Pollard v. Hagan*, 44 US 212 (1845).

The government of this Northwest Territory was established first by the Northwest Ordinance of 1787. Through it, the jurisprudence was established setting forth articles of compact between the original states and the people and future states within the territory. Particularly the ordinance clarified that

> *"no man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed."*

The ordinance further clarified that any newly formed states could *"never interfere with the primary disposal of the soil by the United States..., or with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers."* Accordingly, federal public lands were controlled solely by the United States, and all the lands within the current territory of Michigan fell under federal jurisdiction.

The rough territorial boundaries of Michigan were carved out from the Northwest Territory under a January 11, 1805 Act of Congress, 2 Stat 309, when Michigan became recognized as its own separate territory. And then, through a series of enabling acts, Michigan applied for statehood. After a long drawn out series of bargaining and negotiation, Michigan finally was accepted by the United States as a state, on equal footing, in the Union (5 US Stat. At Large 144); in so doing, Michigan affirmed that it would *"never interfere*

with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers thereof." (5 US Stat at Large 49, 5 US Stat at Large 59, 5 US Stat at Large 144, Michigan ordinance submitting alternatives, July 26, 1836, Michigan assent to condition of admission, December 15, 1836.)

The United States Constitution took immediate affect with the newly formed state of Michigan on the date of its admission; while Michigan became a state on equal sovereign footing as the original states, the Constitution limited Michigan's rights and abilities and forced acceptance of specific limitations with respect to property: *"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"* (US CONST. art. IV, § 3), and "*nor shall private property be taken for public use without just compensation*" (US CONST. amend V, enforced via US CONST. amend XIV). Built inside the constitution hid other restrictions that the new state had to succumb to, including section 10 of Article I which spelled out several limitations that states are forbidden to do. Specifically, Michigan was restricted, as under the Northwest Ordinance of 1787, from impairing obligations of contracts (US CONST. art. I, § 10).

The lands involved in this present controversy arise under patents issued under two different Acts of Congress. Patents 4688 and 4231 were issued under the April 24th, 1820 Act of Congress in which "all the rights, privileges, immunities, and appurtenances of whatsoever nature " were conveyed from the United States to the private parties. Warrants 40653 and 96989 were issued under the March 3, 1855 Act of Congress in which "the appurtenances thereof" were conveyed[10].

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[10] See Appendix B for the detailed wording of the land patents and warrants involved in this controversy. All four patents and warrants were issued in 1869 or 1872.

A. The Property Clause empowers Congress to selectively retain or grant sole sovereignty over public lands patented or granted to private parties.

The nature of control that Congress exerts over Public Lands has long been tested in the courts. States have been found to have no authority over such lands until Congress patents the property to private parties, and even after patented, the control may be limited. *Wilcox v Jackson*, 38 US (13 Pet) 498, 10 L Ed 264 (1839)[11]. The power of the states to condemn land belonging to the United States has been found to be non-existent absent the expressed consent of the US. *Utah Power & Light Co. v US*, 37 S Ct 387, 243 US 389 (1917). State enactments of laws further restraining use of the public lands within their territorial boundaries are unconstitutional unless there is no interference with federal regulations; and very pointedly, while states have been found to have broad trustee and police powers over their jurisdictions, those powers exist only insofar as their exercise may not be incompatible with, or restrained by, rights conveyed to federal government by the Constitution. *Kleppe v New Mexico*, 96 S Ct 2285, 426 US 529 (1976).

The Property Clause gives Congress unlimited power over public lands, and it was not until Act of Congress March 3,

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[11] In the Court's "very brief examination" of *Wilcox v Jackson* of whether a person holding a register's certificate without a patent, can recover the land as against the US, the Court found it necessary to clarify that title passed and vested *according to the laws* (emphasis added) of the United States:

> *We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States*

1875 entitled "An act granting to railroads the right of way through the public lands of the United States[12]" that any power was delegated to the states authorizing condemnation of public property.[13] Such an Act was accomplished through this Property Clause that specifically reserves the rights to promulgate "rules and regulations" with the federal government. Prior to this 1875 Act of Congress, there was no generic dissemination of condemnation powers given to the States for control over public (or even private) lands. Granted, earlier Acts authorized specific entities such as railroads the limited powers to take property to aid in the road's construction[14], but never did an Act of Congress empower a state, such as Michigan, to generically condemn public property until after March 3, 1875.

As this Court has found in evaluating early Acts of Congress, much is to be desired in the content of such acts. Acts exist from 1866 & 1870 that involve right of ways over public lands

> *for ditches, canals, and reservoirs used in diverting, storing, and carrying water for 'mining, agricultural, manufacturing, and other purposes.' The extent of the right of way in point of width or area was not stated, and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record. Obviously this legislation was primitive.* Utah Power & Light Co, Supra.

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[12] March 3, 1875, ch 152, §3, 18 Stat 482.

[13] It was not until the August 1, 1888 Act of Congress that a generic authorization was given for any United States government official to condemnation land for public use.

[14] See Act of Congress July 2, 1864 entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes', approved July first, eighteen hundred and sixty-two.

As indicated in this opinion, the Court recognized the vague nature of the early Acts of Congress[15]. In this light, the acts empowering states to condemn public and private property had been vague, and frankly non-existent until 1875.

In *Kleppe*, the Court considered the powers inherent in the Property Clause and clarified just what limitations exist:

> *The Clause, in broad terms, empowers Congress to determine what are "needful" rules "respecting" the public lands, and there is no merit to appellees' narrow reading that the provision grants Congress power only to dispose of, to make incidental rules regarding the use of, and to protect federal property. The Clause must be given an expansive reading, for "(t)he power over the public lands thus entrusted to Congress is without limitations," United States v. San Francisco, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050.*

Kleppe held that the power of Congress extended beyond simply disposing of the public property and had no limitations. With respect to a state's power of condemnation, Congress created the "needful rules and regulations" that empowered a state to satisfy its public needs only in 1875. With this all encompassing power, Congress can also withdraw a state's power of eminent domain for lands still belonging to the United States that are awaiting disposal to the inhabitants, by revoking any and all such condemnation grants to states[16].

B. All land patents issued prior to March 5, 1875 passed absolute title to the patentee and no state

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[15] In *Andrus v Charlestone Stone Products Co., Inc.*, 98 S Ct 2002, 436 US 604 (1978), the May 10, 1872 Act of Congress was reviewed in light of earlier Acts of Congress from 1866 & 1870 to determine the nature of the "minerals" reserved from patents issued under its provisions. The actual language of the patent was not discussed.

[16] The Constitutional provision forbidding ex post facto laws would apply to patents and warrants already issued since March 5, 1875. US CONST. art. I, § 9.

acquired the power to condemn such property. Only the United States has the power of eminent domain over the property so passed.

The time a patent or warrant issues is crucial for understanding the laws that are attached to it. In this light, this Court has repeatedly held that the nature of a patent is paramount in ascertaining a state's rights to exercise control over real property. In *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465, it is held that the power of Congress is such that it can grant property under navigable waters to a private party and divested such right from the state of Michigan, even though the United States held the property in trust under the Virginia Act of Cession. In clarifying its opinion, this Court stated that states' rights to property is

> *subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held.*

Since the formation of the United States, Congress has been fully conscious of the rights and reservations that it issues in its patents and grants. In its April 21, 1792 Act of Congress entitled "An act authorizing the grant and conveyance of certain lands to the Ohio Company of Associates", property was conveyed in "fee simple." In its March 26, 1804 Act entitled "An act making provision for the disposal of the public lands in the Indiana territory, and for other purposes", Congress recognized the rights of the inhabitants under legal grants from the French government prior to the Treaty of Paris, and legal grants from the British government subsequent to the Treaty of Paris yet prior to the Treaty of Peace. Even the courts of Michigan have

repeatedly recognized the state's limitations to property subject to patents. *Klais v Danowski*, 129 NW2d 414, 373 Mich 262 (1964) (no title thereto passed from the United States to the State of Michigan upon its admission into the Union in 1837, even if submerged land at the time, because then it no longer belonged to the United States but to the Abbott heirs or their successors in title.) *People ex rel. Gazlay v Murray* , 221 NW2d 604, 54 Mich App 685, (1974) (if the land was patented by the United States to a private person before Michigan became a state, then the United States would have had no title to the property to convey upon admission of Michigan to statehood and the title would thus remain in the patentee despite the fact that the patent conveyed lands under navigable water).

In reviewing the types of land grants and patents in the Wexford County area, it is clear that many different rights were patented along with the land under several different Acts of Congress[17]. The states of Maine, Connecticut, Vermont, New Hampshire, Kentucky, Ohio, and Indiana were issued scripts under the July 2, 1862 Act of Congress for which public land was provided for colleges for the benefit of agriculture and the mechanical arts[18] during the years 1875, 1876, and 1878. These scripts were assigned to private parties and given "to have and to hold" with "the appurtenances thereof." Similarly bounty lands were issued under the March 3, 1855 Act of Congress, again, "to have and to hold "with "the appurtenances thereof". Cash entry land was also sold under the April 24, 1820 Act of Congress, passing "all rights, privileges, immunities, and appurtenances, of whatsoever nature". The State of Michigan was also granted land, in favor of the Grand Rapids &

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[17] According to US CONST. art. III, § 2, the Supreme Court has appellate jurisdiction of law and fact. Some factual material is not on the record of the lower court.

[18] *Cornell University v Fiske,* 10 S Ct 775, 136 US 152, (1890) holds that a state receiving script holds only the right to sell it.

Indiana Railroad[19], consisting of nearly every odd-section through Haring Township for the purpose of constructing the said railroad; no reservations were made with this grant.

Our land is patented under the April 24, 1820 and the March 3, 1855 Acts of Congress. All four patents were issued prior to the March 5, 1875 Act of Congress and were conveyed without any sovereignty being passed to the state of Michigan with respect to the power of eminent domain.

It must be stressed that we do not mean to imply that property is not subject to the sovereign power of the body politic, because it is. *West River Bridge Co v Dix*, 47 US 507 (1848). In fact, the body politic is, in our Country one of two entities, the United States or one of the fifty states. Ultimately, one, if not both, of these entities is the sovereignty over the lands within the territorial boundaries of the United States. True, much of the land located in Haring Township in Wexford County is subject to condemnation by the State because much of it (every odd section extending 12 miles in width) emanates from state patents made in favor of the Grand Rapids & Indiana Railroad. In these cases, the State of Michigan has joined in the actual chain of title and thereby gained sovereignty over the property to future property owners. It is true, therefore, that much of the existing case law is valid and holds for a vast majority of properties in our specific region of the country .

But it is to the remaining properties that we turn our attention. It is to the military bounty warrants and the property issued under the April 24th, 1820 Act of Congress that explicitly and in no uncertain terms, passed all immunities from the United States to the patentee. In these specific instances, the sovereign remains in the United States - in the Union, and not in one of the many states. In these instances, the patents were issued with the common good of

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[19] See the following Acts of Congress that detail the nature of the Grand Rapids & Indiana Railroad grant: June 3, 1856; June 7, 1864; and March 3, 1865.

providing for the Union by drumming up soldiers (via bounty lands) in the defense of the Country, and by fostering the creation of funds by selling property under explicit and attractive conditions to gain money for the payment of debts of the young Country (via land cash sale patents).

It is true that the Act of Cession by Virginia limited the United States actions by ascertaining its efforts must result in the admittance of states on "equal footing" with the original states. While this is true, it also conceded that the public lands were completely under the dominion of the Union, and any needful rule or regulation was explicitly granted from Virginia to the United States. Clearly, the United States found itself depleted of financial resources and in need of paying off its debts, both to soldiers and to foreign countries. It fostered the rules and regulations to obtain these funds and created contracts, in form of patents, to pass all its own immunities to the patentees under the April 24, 1820 Act of Congress.

Because MDOT has collaterally attacked our patents by taking our land from us, the state of Michigan has violated US CONST. art. I, § 10. that prohibits the state, or any of its agencies, from interfering with our patents. This Court recognizes that land patents and land grants from the US government are "contracts" within the meaning of US CONST. art. I, § 10. *Providence Bank v. Billing,* 29 US 514 (1830). No argument can be made by MDOT to assert that it desires to challenge our patents' validity, because Act of Congress March 3, 1891, c. 559, 26 Stat. 1093, established the statutes of limitations for challenging a patent; it is five years from the date of issuance. Specifically the Act provides that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act." Considering our patents were issued in 1869 and 1872, the statute of limitation has expired and patents, carrying their protections, cannot be cancelled at this late date. This Court has recognized that the right of action

of the United States, assuming it to have had any, was complete at the date of the passage of the act, and the lapse of five years without action to annul the grant resulted in the confirmation of it. *US v Chandler-Dunbar Water Power Co,* 152 F 25 (1907).

C. The patent issued with "all rights, privileges, and immunities, of whatsoever nature" forbid Michigan from obtaining the power of eminent domain over the property.

It is well settled that in a public grant, nothing passes by implication, and unless a grant is explicit with regard to the property it conveys, construction by the Courts will be adopted which favors sovereign.. *US v Jenks*, 129 F3d 1348 (1997). With the clear and explicit language of our patents issued from the 1820 Act of Congress, "all rights, privileges, immunities, and appurtenances, of whatsoever nature" nothing is left to implication. All rights pass. All privileges pass. All immunities pass. All appurtenances pass.

This Court held that the grant of land by the United States to the territory of Iowa for the purpose of improving the navigation of the Des Moines river is to be strictly construed against the grantees, and nothing passes but what is conveyed in clear and explicit language. *Dubuque & PR Co v Litchfield*, 64 US 66 (1859). How much more clear can our two patents be? All possible control over our land passed with the patents.

II. THE COURT SHOULD DETERMINE THE CONSTITUTIONALITY OF THE MICHIGAN UNIFORM CONDEMNATION PROCEDURES ACT, 1980 PA 87.

The Uniform Condemnation Procedures Act is the methodology by which the state of Michigan and its agencies are empowered to take private property. It sets forth the procedures required for reviewing the necessity of the take and determining the award of just compensation. It repealed

numerous other statutes that were in force at the time in order to provide a more unified method by which the courts could address the state's power of eminent domain. At issue in this argument is the constitutionality of the Act.

We exert our Constitutional rights of due process guaranteed by MICH CONST 1963, art 1, § 2 which provides that "no person shall be denied the equal protection of the laws" and US CONST, amend XIV, § 1 which provides that no state shall "deprive any person of...property, without due process of law." While the Michigan Constitution is the "supreme" law of our State, it is second to that of the United State's Constitution. US CONST, art VI, § 2. Any law made in pursuance thereof, must be constitutional. *Anchor Bay concerned Citizens v People ex rel Kelly*, 55 Mich App 428, 223 NW2D 3 (1974), appeal denied 394 Mich 779, 229 NW2d 338. As set forth below, the Uniform Condemnation Procedures Act is not constitutional and is void.

A. The Michigan Constitution solidifies the right to trial by jury for the determination of necessity, yet the UCPA forbids us that right.

Michigan's 1963 Constitution guarantees that citizens have the right to trial by jury in civil cases,[20] yet vaguely defines its provisions for taking private property through its power of eminent domain[21], unlike the previous constitution of 1908. Because of the nature of the language of the new Constitution in which no mention is made regarding the nature of trials by jury in the situation of taking private

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[20] MICH CONST 1963, art 1, § 14 provides that "the right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree."

[21] MICH CONST 1963, art 10, § 2 provides "private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

property, the jury trial provisions of the earlier Constitution holds. Specifically, MICH CONST 1908, art 13, § 2 provides

> *When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: Provided, that the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties.*

Many case laws exist in Michigan history supporting the trial by jury concept for a review of necessity. See *State Highway Commission v Vanderkloot*, 392 Mich 159, 220 NW2d 416 (1974).

It is true that we never asserted our right to a trial by jury for the review of the taking of our property, but this cannot be deemed a waiver. The Michigan Supreme Court has held that there is no waiver where no method is prescribed, or the conditions are such as to render execution of the provision impossible. *Odell v Reynolds*, 40 Mich 21 (1879). Since the provisions of the UCPA prohibit a trial by jury for a review of necessity[22], not only have we NOT waived our constitutional right, but the Act is repugnant to the Constitution and is void.

B. The Michigan Constitution solidifies the right to trial by a jury of 12 freeholders for the determination of just compensation, yet the UCPA limits us to a jury of "6 qualified electors."

As already mentioned in this writ, the 1963 Michigan Constitution guarantees that citizens have the right to trial by jury in civil cases, unless waived.[23] It is from the 1850

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[22] MCL 213.56, MSA 8.265(6) authorizes only a review by the Court.
[23] MICH CONST 1963, art 1, § 14.

Michigan Constitution that we are entitled to the right to a trial by jury of 12 freeholders for determining the amount of just compensation;[24] this is so because no provision in either the 1908 or 1963 Michigan Constitutions have altered the Constitutional right founded in 1850, yet each Constitution guaranteed the right to trial by jury would remain[25].

The Michigan Supreme Court is well aware of the earlier constitutional provisions as they relate to condemnation. First it should be noted that a freeholder is a person who possesses an estate in land held in fee simple, in fee tail, or for term of life. *Blacks Law Dictionary*, 7th Edition. Freeholders know something of the value of the lands sought to be condemned. *Brewster Street Housing Site in City of Detroit, In re*, 291 Mich 313, 289 N.W. 493 (1939). In early condemnation proceedings, the jury was a jury of inquest, and were authorized to act as judges of the law and facts, with the judge attending only in an advisory capacity. *Supra. Brewster* further clarifies the nature of the proceedings:

> *Proceedings for the condemnation of property are not tried before a court. The constitutional tribunal here involved was a jury of 12 freeholders residing in the vicinity of such property. They were charged by the Constitution of this State with the duty to determine whether there was a necessity for using such property sought to be taken, and if they found there was a necessity for taking such property for a public use, to fix the just compensation to be made therefor. This seems plain from*

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[24] MICH CONST 1850, art 18, § 2 provides "When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefore, except when to be made by the state, shall be ascertained by a jury of twelve free-holders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law: Provided, the foregoing provision shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duty as highway commissioners."

[25] See MICH CONST 1963, art 1, § 14, and MICH CONST 1908, art 2, § 13

section 2, article 13, of the Constitution of 1908. Proceedings under this section of the Constitution, therefore, will not be reviewed in the same manner as if the proceeding was one tried before a court and jury according to the course of the common law. [supporting case laws omitted]

The Legislature cannot defeat a defendant's constitutional rights simply by changing the title of a jury. *People v. Antkoviak,* 242 Mich App 424, 619 NW2d 18 (2000). As such, the UCPA is unconstitutional in that it is repugnant to the Constitutional guarantees to a trial by jury of 12 freeholders.

C. The Michigan Constitution requires the court to determine if a taking is "authorized by law," yet the UCPA places the burden of proof on the property owner to show fraud, error of law, or abuse of discretion.

Michigan's 1963 Constitution authorizes determinations of an administrative agency to be reviewed by the courts and requires, at a minimum, that a reviewing court make a determination as to whether or not a decision is authorized by law.[26] Unfortunately the UCPA does not follow the requirements and instead places the burden of proof (regarding the necessity of a taking) onto the property owner to show fraud, error of law, or abuse[27] and has a long list of current case law supporting this actual practice. *Kent County*

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[26] MICH CONST 1963, art 6, § 28 provides that " All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and , in cases in which a hearing is required, whether the same are supported by competent material and substantial evidence on the whole record."

[27] MCL 213.56(2), MSA 8.265(6)(2).

Road Com'n v Hunting, 170 Mich App 222, 428 NW2d 353 (1988), appeal denied. *City of Lansing v Jury Rowe Realty Co*, 59 Mich App 316, 229 NW2d 432 (1975). *Board of County Road Com'rs, Livingston County v Herbst*, 38 Mich App 150, 195 NW2d 894 (1972). *City of Muskegon v Irwin*, 31 Mich App 263, 187 NW2d 481, (1971). *Board of County Road Com'rs for Kalamazoo County v Docsa*, 21 Mich App 546, 175 NW2d 899 (1970), remanded 384 Mich. 756, 179 NW2d 622. While even the Michigan Supreme Court has clarified that a court must determine whether errors of law have been committed by determining whether findings of fact are supported by competent, material, and substantial evidence on the whole record (*National Standard Co v Department of Treasury*, 384 Mich 184, 180 NW2d 764 (1970)) the courts have not reviewed the statute in this light.

D. The title-object clause of the Michigan Constitution requires the contents of a law to be expressed in the title of the law, yet the title to the UCPA does not include all of its content.

Michigan's 1963 Constitution requires that "No law shall embrace more than one object, which shall be expressed in its title . . .[28]" yet the UCPA does not comply with this mandate. The purpose of the clause is to give fair notice to the public about the content of the law. *HJ Tucker & Associates, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 559; 595 NW2d 176 (1999), quoting *Ray Twp v B & BS Gun Club*, 226 Mich App 724, 728; 575 NW2d 63 (1997).

Specifically the title provides that its purpose is "to provide procedures for the condemnation, acquisition, or exercise of eminent domain of real or personal property by public agencies or private agencies; to provide for an agency's entry upon land for certain purposes; to provide for damages; to prescribe remedies; and to repeal certain acts and parts of acts." With respect to the title of the UCPA, it has

[28] MICH CONST 1963, art 4, § 24

been found to be controlling in determining that the Act is not intended for use in inverse condemnation cases. *Lim v Michigan Dept. of Transp.* 423 NW2d 343, 167 Mich App 751 (1988), appeal denied.

The title to the act does not give fair notice that the manner by which to challenge the taking[29] of the property is included; it does not give fair notice that a property owner is restricted in challenging the validity of the court proceeding[30]. The title and the body of the statute do not address the same subjects; and considering the procedure for a property owner to challenge the necessity of the taking is not included in the title of the statute, yet it is a substantial part of the body of the statute, the Act is unconstitutional.

E. The title-object clause of the Michigan Constitution requires only one object to be expressed in the law, yet the UCPA expresses two.

Michigan's 1963 Constitution requires only one object to be encompassed in any law[31]. The "object" of a law is defined as its general purpose or aim. *Local No 1644 v Oakwood Hosp Corp,* 367 Mich 79, 91; 116 NW2d 314 (1962). The UCPA is aimed at two things: reviewing the need for taking property, and determining the amount of just compensation for property so determined as needed. For the most part, the Act provides detailed instructions on how to go about determining the award of just compensation. As in an after thought, one section is dedicated to provide methods to challenge necessity. In and of themselves, the review of necessity and the determination of just compensation are two entirely different things. "Just compensation" is that amount that places the property owner in a condition as good as the owner would have been in had taking not occurred. *Oakland Hills Development Corp. v. Lueders Drainage Dist.* 537

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[29] MCL 213.56, MSA 8.265(6)
[30] MCL 213.56(6), MSA 8.265(6)(6)
[31] MICH CONST 1963, art 4, § 24

NW2d 258, 212 Mich App 284 (1995). Necessity involves the power of eminent domain which is "the rightful authority which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand." *People ex rel Trombley v Auditor-General*, 23 Mich 471 474 (1871). The Michigan Legislature distinguished the two concepts as follows:

> *In general, there are two issues to be decided in a condemnation case. The first is the determination of "public necessity" - whether there is some compelling public need that justifies the agency's taking of property from its owner. If public necessity is established, the second issue is the question of "just compensation" - how much the owner should be paid. The determination of just compensation is concerned not only with the actual value of the property being acquired, but also with how much the acquisition and subsequent use to which the property is put affects the value of the owner's remaining property, either positively or negatively. Under the bill, the determination of public necessity, if challenged, could only be decided by the court, while just compensation would be decided by a jury at the demand of either the owner or the agency.*[32]

The legislature, when enacting the law, moved to limit the appellate review of necessity, while not so limiting that of just compensation. While it may be true that both necessity and just compensation are included under the very broad idea of condemnation, it is not true that they encompass the same object. One goes about reviewing the need for a take. The other goes about determining the fair market value, and thus, the award for just compensation. It is entirely feasible that a

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[32] House Bill 4652 (Substitute H-2, First Analysis [12-14-79] and As enrolled, Second Analysis [6-19-80], page 1)

review of necessity may cease a condemnation action. It is equally feasible that a review of necessity may provide the impetus for determining the award of just compensation. These two ideas are indeed two different objects.

F. The Michigan Constitution restricts any general revisions of laws and mandates altered and amended laws to be re-enacted and published at length, yet the UCPA revised several laws without fulfilling these constitutional requirements.

Michigan's 1963 Constitution prevents any law from being revised, altered or amended by reference to its title only and mandates re-enactment and publishing at length for any altered or amended laws[33]. The purpose of this Constitutional provision is to keep the law clear; it should not be impossible to tell what the law is. *Alan v Wayne County*, 200 NW2d 628, 338 Mich 210 (1972), rehearing denied 202 NW2d 277, 388 Mich 626.

Unfortunately, the UCPA generically specifies a variety of alterations in subsection 1 of section 25 of the Act as amended in 1985. "Except as otherwise provided by subsections (2), (3), and (4), effective May 1, 1980, all actions for the acquisition of property by an agency under the power of eminent domain shall be commenced pursuant to and be governed by this act." A long laundry list of public acts is spelled out in sections 2, 3, and 4 clarifying effective dates for the new act. Each of these Acts were affected and altered by the enactment of the Uniform Condemnation Procedures Act, yet they were never republished at length. Even our own Attorney General found that to amend a particular act, the legislature must reenact and republish those sections which are to be amended in the amended form and cannot amend an act by merely referring to it in a statute which is a part of a separate body of law. Op. Atty. Gen. 1974, No. 4828, p. 198.

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[33] MICH CONST 1963, art 4, § 25

It seems that each time we raise an issue invoking the provisions of another act, the courts dismiss the provisions in favor of another statute that is more favorable to the state. This we have found quite true in the second condemnation case commenced by MDOT to extend the temporary taking of a portion of our property[34].

III. THE COURT SHOULD SOLIDIFY THE DYNAMIC NATURE THAT LAWS ARE APPLIED TO STATES WHEN CONCERNING THE SOVEREIGN POWER OF EMINENT DOMAIN.

We assert our rights to obtain the equal protection of the law and insist that we have the right to due process[35] One right we assert is for the Court of Appeals to fully adjudicate our rights by fully giving affect to our assertion that subject matter jurisdiction is absent in the lower court. We insist that our payment of just compensation cannot be premised on an exchange of a W-9[36]. We assert that our property has not been taken by the power of eminent domain as just compensation has not been made to us and resultantly MDOT is trespassing and owes us restitution. Our children deserve just compensation, as they are a party to this litigation and have rights taken from them; and the final adjudication of this litigation up until this point in time has not even recognized them. Our fifth amendment due process rights guarantee us all (Carl, Bertha, Mark & Anita) the "equal

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[34] In 2000, MDOT again instituted another condemnation action to temporarily extend the time for taking the temporary take of 1.87 acres of our property. We proceeded in proper person and were informed by Circuit Court Judge Horn that there are many laws on the book and anyone can find a law that works in their favor. See the April 15, 2002 transcript, page 51, lines 6-8 in which the court stated "you handed me a piece of paper that has got a law on it. You can dig through a law book and find a lot of laws."

[35] US CONST, amend XIV, § 1 provides that no state shall "deprive any person of...property, without due process of law."

[36] Nor can just compensation include payment to the condemning party for attorney fees and expert witness fees, under any circumstance.

protection of the laws." Our property (tangible and intangible) has been taken from us, and the all powerful, and very intimidating power of the state of Michigan has stripped us of that which we are entitled to by setting up laws that are cumbersome and tedious, by encouraging the practice of lawyers and frowning upon anyone pursuing his or her rights in proper persona, by not assisting condemnees in these proceedings, and by precluding judicial review of those things that our attorney forced on us to speed up MDOT's acquisition of our property. Every party, including the Court, has been fully aware of our claim of sovereignty from the beginning of this lawsuit. While we may not have followed the detailed and mind-numbing methods set forth by our legislatures or the Michigan Court Rules, there can be no doubt that the intent of the law is to protect its citizens[37]. We have a right to be heard; we have a right to ALL the laws (just as MDOT has the same right); and we have the right to justice.

A. An order upholding the validity of the condemnation proceeding must be entered to preclude appellate review of the proceedings.

Commonly, the claim that a court lacks subject matter jurisdiction may be raised at any time, MCR 2.116(C)(4), (D)(3), including for the first time on appeal. *Phinney v Perlmutter*, 222 Mich App 513, 564 NW2d 532 (1997). Yet when a specific statute limits that review, the general rule does not apply. In our case, the Court of Appeals held that this appellate review is precluded due to the provisions in MCL 213.56(6), MSA 8.265(6)(6) which restricts a challenge to the validity of the proceedings. The provision is, in part, as follows:

> *an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable to the court of appeals only by*

[37] See US CONST, preamble.

leave of that court pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation. MCL 213.56(6), MSA 8.265(6)(6).

As such, an order must first be entered that upholds the validity of the condemnation proceeding.

In fact, an order has never been entered on the record in our case to this effect, and the provisions of MCL 213.56(6), MSA 8.265(6)(6) have not been invoked. Therefore, as expressed in MCL 213.52(1), MSA 8.265(2)(1), "all laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in this act" and by default, the general rules apply. The Michigan Court of Appeals has been firm in its rulings on condemnation, much as the lower courts have been, and has readily, with haste, assumed the power of eminent domain exists. Because of this mindset, the Court's refuse to hear our appeal that they may be wrong, and readily rule, and always rule, in the state's favor without blinking an eye.

B. The payment of just compensation cannot be conditioned upon the release of a signed W-9 and Michigan's constitutional provision violates US Const, Amend V.

The lower court order conditions our receipt of our award of just compensation[38] on our providing a signed W-9[39]. This

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[38] The amount of just compensation was deposited into the court's non-interest bearing escrow account in two payments ($238,147.46 including interest), of which, MDOT removed attorney fees and expert witness fees ($31,234.12), added our expert witness fees ($22,010.00), [then the court paid out some of our expert witness fees ($18,370)] and has thereby depleted our award of $237,000.000 plus interest to $210,553.34. This amount falls significantly short of our award.

[39] There is no breakdown of the award as to the amount considered for damages as opposed to the amount considered for fair market value. As such, it is impossible for us to properly complete our tax information.

is a clear violation of our rights to just compensation according to US CONST, amend V, MICH CONST 1963, art 10, § 2, and MCL 213.75, MSA 8.265(25). We assert our due process rights under US Const, amend XIV.

C. The return of the award for just compensation to MDOT by the lower court voids MDOT's condemnation efforts, and MDOT is now liable for trespass-nuisance.

We have not been paid our award of just compensation. We have adjudicated this controversy and MDOT was ordered to pay us $237,000.00, plus interest, in just compensation. We have not yet received this money, and in fact, MDOT, while paying the award into the Court in 1999[40], is now back in possession of the money[41]. In essence, MDOT has not paid us just compensation for the taking, we have signed no document conferring any ownership interest to MDOT, and we therefore are owners of our entire parcel, as was the case prior to the institution of this proceeding. Government immunity has been waived by the State of Michigan for cases of trespass-nuisance and MDOT is liable for such charges; we know this because only the legislature can waive the defense of governmental immunity, *Cain v Lansing Housing Comm'n*, 235 Mich App 566, 599 NW2d 516 (1999), and it did so in the Governmental Tort Liability Act under MCL 691.1407(1), MSA 3.996(107)(1).

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[40] Payment was made via the State Treasury.

[41] See Appendix D and the letter from the Wexford County Clerk dated June 17, 2003, returning the money to MDOT.

D. Our property is a cattle farm and the taking requires a cattle pass to be installed to allow access from the building side of the taking to the large land track side of the taking.

Federal regulations authorize the instillation of cattle passes for properties that are dissected with roads and highways. According to CFR 712.805, stock passes may be incorporated into a highway design in order to reduce the disruptive operation of a farm. Our farm has severely been hindered. Our residence and buildings are on a triangular shaped parcel consisting of approximately 19+ acres; the majority of our pastures and farm fields, and all of our natural water supply remain on the other parcel which is inaccessible to us due to the highway. Our award for just compensation is appropriate when it places us in as good a condition as we had been in before the taking; and that condition involved our cattle having access to natural water and our pastures and fields.

CONCLUSION

Cases involving states as a party involve a great deal of resources on the side of the state and limited resources from the side of the opposition; as such, we are proceeding in proper person (primarily due to our having limited resources) and ask that this Court liberally construe our filings as we are not formally educated in law. We endeavor to read and follow the rules of the Court and the law; if we error in method or procedure, please recognize that the error is not done purposely. We truly feel we have a case of significant importance that can, and does, affect the citizens of the Public Land states. It is our goal to improve not only ourselves with respect to our lands, but our state, and our Country, much as the Founding Fathers aimed to do in the late 1700's.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

Carl Edwin Fagerman
Bertha Louise Fagerman
9107 E 30 RD
Cadillac, MI 49601
(231) 775-6390

August 2003

APPENDIX A: OPINIONS, ORDERS, FINDINGS OF FACT

STATE OF MICHIGAN
In the Circuit Court for the County of Wexford

In the matter of the complaint of the Michigan Department of Transportation for condemnation Of private property for highway purposes in and Through the Township of Haring, Wexford County, Michigan

Hon. Charles D. Corwin
Court No. 96-12551-CC

Michigan Department of Transportation (MDOT)
Plaintiff

v

Carl E. Fagerman and Bertha L. Fagerman, husband and wife
Respondents

Lawrence P. Schneider (P27325)
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Robert D. Sheehan (P44634)
Attorney at Law
Attorney for Defendants
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Judgment on Jury Verdict

At a session of the Wexford County Circuit Court held in the City of Cadillac on July 1, 1999.

Present: The Honorable Charles D. Corwin, Circuit Judge

A jury trial was held in this case on June 15 through June 18, 1999 before visiting Circuit Judge Carl L Horn. The jury rendered its verdict on June 18, 1999, finding that Defendants Carl and Bertha Fagerman ("the Fagermans") are entitled to total just compensation in the amount of $237,000 as a result of the taking described in the Declaration of Taking filed in this case. As a result, the Court enters the following orders:

IT IS ORDERED THAT Plaintiff MDOT pay to the Fagermans the total sum of $237,000 as full just compensation for all claims they may have against the Plaintiff by reason of the taking, less all amounts for just compensation previously paid to the Fagermans. In the event that the Fagermans do not timely provide MDOT or the State of Michigan with signed and completed W-9 forms to enable direct payment to them, the payment of this sum shall be made to the Wexford County Circuit Court (FIN 38-6007337) to be held by the Court on behalf of the Fagermans until such time as they provide the necessary W-9 forms to the court.

IT IS FURTHER ORDERED THAT any due, payable, or delinquent taxes, assessments, charges, or indebtedness, if there are any, shall be deducted by Plaintiff MDOT prior to its payment of this sum to the Fagermans.

IT IS FUTHER ORDERED THAT Plaintiff pay statutory interest on the amount of the total just compensation awarded by the jury, less sums previously paid to the Fagermans, from the date that the Fagermans voluntarily

surrendered possession on April 1, 1998 to the date of payment of the amount due or any part of the amount.

IT IS FURTHER ORDERED THAT the Plaintiff pay a reasonable attorney fee to Robert D. Sheehan, P.C. (EIN 38-3445868), the attorney for the Fagermans, of up to one-third of the difference between the good faith offer of just compensation of $179,200 and the jury verdict of $237,000, plus any applicable interest. In the event that the parties are unable to agree upon the amount of the reasonable attorney fee to be paid to the attorney for the Fagermans, either side may petition the Court for a hearing to decide the disputed issue.

IT IS FUTHER ORDERED THAT the Plaintiff reimburse the Fagermans for reasonable expert witness fees as required by MDL 213.66. In the event that the parties are unable to agree upon the amount of any expert witness fee or whether certain work performed by the expert is reimbursable, either side may petition the Court for a hearing to decide the disputed issue.

IT IS FUTHER ORDERED THAT Plaintiff reimburse the Defendants costs which may be taxed under MCR 2.625.

IT IS FUTHER ORDERED THAT any requests by either party for costs or sanctions under MCR 2.403 or MCR 2.405 shall be filed within the time limits provided by the applicable court rules.

/s/
Charles D. Corwin (P27138)
Circuit Judge
for
Carl L. Horn (P15124)
Visiting Circuit Judge

Filed July 01, 1999.

STATE OF MICHIGAN

In the Circuit Court for the County of Wexford

In the matter of the complaint of the Michigan Department of Transportation for condemnation Of private property for highway purposes in and Through the Township of Haring, Wexford County, Michigan

Hon. Charles D. Corwin
Court No. 96-12551-CC

Michigan Department of Transportation (MDOT)

Plaintiff

v

Carl E. Fagerman and Bertha L. Fagerman, husband and wife

Respondents

Lawrence P. Schneider (P27325)
Special Assistant Attorney General
Attorney for Plaintiff
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Robert D. Sheehan (P44634)
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Judgment on Jury Verdict

At a session of the Wexford County Circuit Court held in the City of Cadillac on July 8, 1999.

Present: The Honorable Charles D. Corwin, Circuit Judge

A jury trial was held in this case on June 15 through June 18, 1999 before visiting Circuit Judge Carl L Horn. The jury rendered its verdict on June 18, 1999, finding that Defendants Carl and Bertha Fagerman ("the Fagermans") are entitled to total just compensation in the amount of $237,000 as a result of the taking described in the Declaration of Taking filed in this case. As a result, the Court enters the following orders:

IT IS ORDERED THAT Plaintiff MDOT pay to the Fagermans the total sum of $237,000 as full just compensation for all claims they may have against the Plaintiff by reason of the taking, less all amounts for just compensation previously paid to the Fagermans. In the event that the Fagermans do not timely provide MDOT or the State of Michigan with signed and completed W-9 forms to enable direct payment to them, the payment of this sum shall be made to the Wexford County Circuit Court (FIN 38-6007337) to be held by the Court on behalf of the Fagermans until such time as they provide the necessary W-9 forms to the court.

IT IS FUTHER ORDERED THAT Plaintiff pay statutory interest on the amount of the total just compensation awarded by the jury, less sums previously paid to the Fagermans, from the date of taking. October 24, 1996, to the date of payment of the amount due or any part of the amount.

IT IS FURTHER ORDERED THAT the Plaintiff pay a reasonable attorney fee to Robert D. Sheehan, P.C. (EIN 38-3445868), the attorney for the Fagermans, of thirty three and one-third percent (33 1/3%) of the difference between the good faith offer of just compensation of $179,200 and the

jury verdict of $237,000 plus any applicable interest within fifteen (15) days of this Order being entered.

IT IS FUTHER ORDERED THAT the Plaintiff reimburse the Fagermans for reasonable expert witness fees as required by MDL 213.66. In the event that the parties are unable to agree upon the amount of any expert witness fee or whether certain work performed by the expert is reimbursable, either side may petition the Court for a hearing to decide the disputed issue.

IT IS FUTHER ORDERED THAT Plaintiff reimburse the Defendants costs which may be taxed under MCR 2.625.

IT IS FUTHER ORDERED THAT there shall be no costs or sanctions awarded to either party under MCR 2.403 or MCR 2.405.

IT IS FUTHER ORDERED THAT MDOT is to install or pay for costs of installing two (2) driveways to access the Fagermans' property within the next ninety (90) days.

IT IS FUTHER ORDERED THAT MDOT waives any claims for rent, pursuant to a prior Court Order dated December 18, 1997, from the Fagermans.

Dated: 7/8/99

/s/
Charles D. Corwin (P27138)
Circuit Judge
for
Carl L. Horn (P15124)
Visiting Circuit Judge

Filed July 09, 1999.

STATE OF MICHIGAN
In the Circuit Court for the County of Wexford

In the matter of the complaint of the Michigan Department of Transportation for condemnation Of private property for highway purposes in and Through the Township of Haring, Wexford County, Michigan

Hon. Charles D. Corwin
Court No. 96-12551-CC

Michigan Department of Transportation (MDOT)

Plaintiff

v

Carl E. Fagerman and Bertha L. Fagerman, husband and wife

Respondents

Lawrence P. Schneider (P27325)
Special Assistant Attorney General
Attorney for Plaintiff
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Robert D. Sheehan (P44634)
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Amended Judgment on Jury Verdict

At a session of the Wexford County Circuit Court held in the City of Cadillac on July 23, 1999.

Present: The Honorable Charles D. Corwin, Circuit Judge

A jury trial was held in this case on June 15 through June 18, 1999 before visiting Circuit Judge Carl L Horn. The jury rendered its verdict on June 18, 1999, finding that Defendants Carl and Bertha Fagerman ("the Fagermans") are entitled to total just compensation in the amount of $237,000 as a result of the taking described in the Declaration of Taking filed in this case. The Court entered a Judgment on Jury Verdict on July 1, 1999, but the Defendants filed timely objections which were delayed in the mail, so the parties have agreed that the original Judgment be vacated and that this Judgment shall be controlling. As a result, the Court enters the following orders:

IT IS ORDERED THAT the Judgment on Jury Verdict entered by the Court on July 1, 1999 is vacated and that this Amended Judgment on Jury Verdict shall superceded that Judgment in all respects.

IT IS ORDERED THAT Plaintiff MDOT pay to the Fagermans the total sum of $237,000 as full just compensation for all claims they may have against the Plaintiff by reason of the taking, less all amounts for just compensation previously paid to the Fagermans. In the event that the Fagermans do not timely provide MDOT or the State of Michigan with signed and completed W-9 forms to enable direct payment to them, the payment of this sum shall be made to the Wexford County Circuit Court (FIN 38-6007337) to be held by the Court on behalf of the Fagermans until such time as they provide the necessary W-9 forms to the court.

IT IS FURTHER ORDERED THAT any due, payable, or delinquent taxes, assessments, charges, or indebtedness, if there are any, shall be deducted by Plaintiff MDOT prior to its payment of this sum to the Fagermans upon proof by the Treasurer of the State of Michigan of the amounts withheld and the reasons for the withholding.

IT IS FUTHER ORDERED THAT Plaintiff pay statutory interest on the amount of the total just compensation awarded by the jury, less sums previously paid to the Fagermans, from the date that the Fagermans voluntarily surrendered possession on April 1, 1998 to the date of payment of the amount due or any part of the amount.

IT IS FURTHER ORDERED THAT, Plaintiff and Defendants having agreed that the circumstances of the case justify reimbursement of a reasonable attorney fee, Plaintiff shall pay the law firm representing Defendants, Robert D. Sheehan, P.C. (EIN 38-3445868) one third of the difference between the initial written good faith offer $179,200 and the ultimate award of $237,000 plus one-third of the interest paid to Defendants.

IT IS FUTHER ORDERED THAT this Judgment does not dispose of all the claims or adjudicated all of the rights and liabilities of the parties for the reason that Defendants' right to petition for the reimbursement of appraisal fees, costs or other related matters as may be allowed by law, and Plaintiff's right to petition for mediation sanctions under MCR 2.403, are expressly reserved. With those exceptions, however, this Judgment disposes of all claims arising out of the taking of Defendants' property for highway purposes.

/s/

Charles D. Corwin (P27138)
Circuit Judge
for
Carl L. Horn (P15124)
Visiting Circuit Judge

We stipulate to the form of this judgment:

/s/
Lawrence P. Schneider (P27325)
Special Assistant Attorney General
Attorney for Plaintiff

/s/
Robert Sheehan (P44634)
Attorney for Defendants[1]

Filed July 26, 1999.

[1] Please note that we forbid our attorney from signing any document without our explicit consent according to our contractual agreement made at the time of his hire. MDOT and the Court were fully aware of this contractual agreement. The relevant letter and requirements list from us to our attorney is reproduced in Appendix D of this Petition. This stipulation was made without our consent.

STATE OF MICHIGAN
In the Circuit Court for the County of Wexford

In the matter of the complaint of the Michigan Department of Transportation for condemnation Of private property for highway purposes in and Through the Township of Haring, Wexford County, Michigan

Hon. Charles D. Corwin
Court No. 96-12551-CC

Michigan Department of Transportation (MDOT)

Plaintiff

v

Carl E. Fagerman and Bertha L. Fagerman, husband and wife

Respondents

Lawrence P. Schneider (P27325)
Special Assistant Attorney General
Attorney for Plaintiff
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Robert D. Sheehan (P44634)
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Order Denying Motion for New Trial

At a session of the Wexford County Circuit Court held in the City of Cadillac on September 10, 1999.

Present: The Honorable Charles D. Corwin, Circuit Judge

The Respondents filed a motion for a new trial and supporting brief of August 12, 1999. The Plaintiff filed an answer to the motion and supporting brief on September 2, 1999. Oral arguments were heard before visiting Judge Carl L. Horn on September 10, 1999. For the reasons stated on the record by the Court:

IT IS ORDERED THAT the motion for new trial is denied.

/s/
Charles D. Corwin (P27138)
Circuit Judge
for
Carl L. Horn (P15124)
Visiting Circuit Judge

Filed October 11, 1999.

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,
Plaintiff-Appellee,

v

CARL E. FAGERMAN and BERTHA L. FAGERMAN,
Defendants-Appellants.

No. 223147
Wexford Circuit Court
LC No. 96-012551-CC

UNPUBLISHED
July 26, 2002

Before: Meter, P.J., and Markey and Owens, JJ.
PER CURIAM.

Defendants appeal by right from a judgment entered after a jury trial in this condemnation case.

In 1995, plaintiff determined that it was necessary to acquire through eminent domain a portion of defendants' 232.1-acre working farm in order to relocate Highway US-131 around the city of Cadillac. Plaintiff intended to acquire a 38.53-acre parcel that would dissect defendants' farm into two remainders separated by a four-lane highway. Plaintiff also intended to acquire a temporary easement or right-of-way over 1.87 acres of defendants' remainder for use during highway construction. Following a jury trial, the trial court entered an amended judgment on the jury's verdict that awarded just compensation of $237,000, plus interest and attorney fees, to defendants. We affirm.

Defendants first argue that the circuit court lacked subject matter jurisdiction in this proceeding because plaintiff failed to make a good-faith purchase offer, as required by MCL 213.55(1). After defendants filed their appellate brief challenging the subject matter jurisdiction of the circuit court, plaintiff moved in this Court for partial dismissal, contending

that *In re Acquisition of Land for the Central Industrial Park Project,* 177 Mich App 11; 441 NW2d 27 (1989), a case relied on by defendants, was wrongly decided. This Court then issued an order denying the motion for partial dismissal but directing the parties to file supplemental briefs essentially addressing whether the holding of *In re Acquisition, supra,* should stand in light of MCL 213.56(6).

In *Acquisition,* the governmental entity had initiated eminent domain proceedings against the defendants' property after having made an offer to purchase the property, but the offer did not include an amount for the moveable fixtures. *Acquisition, supra* at 13, 17. This Court concluded that the circuit court lacked subject matter jurisdiction over the governmental entity's complaint because the offer, by not including an amount for the movable fixtures, did not constitute a good-faith offer and because a good-faith offer was necessary to establish subject matter jurisdiction. *Id.* at 17-18. Defendants in the instant case contend that plaintiff's offer to them also excluded, *inter alia,* amounts for fixtures and therefore did not constitute a good-faith offer. Relying on *Acquisition,* they thus contend that the circuit court lacked subject-matter jurisdiction.

However, MCL 213.56(6) states, in part:

> an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable to the court of appeals only by leave of that court pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation.

In *Detroit v Lucas,* 180 Mich App 47, 50; 446 NW2d 596 (1989), this Court deemed the above language "clear and unambiguous" in holding that the defendants had failed to file timely for leave to appeal and thus had waived their challenge to a finding of necessity with regard to

condemnation. See also *Calloway-Gaines v Crime Victim Services Comm,* 463 Mich 341, 346; 616 NW2d 674 (2000) (the plain language of subsection 6(6), requiring the timely filing of an appeal from an order upholding the determination of public necessity or upholding the validity of the condemnation proceeding, constitutes a limitation on the jurisdiction of the Court of Appeals).

We conclude that in light of MCL 213.56(6), the *Acquisition* panel erred in failing to recognize that it lacked jurisdiction to consider the issue whether a good-faith purchase offer had been made; indeed, such jurisdiction was lacking because the issue was not timely raised but was instead raised after just compensation had been determined and appealed[1]. In the instant case, defendants similarly did not timely raise the issue of a defective good-faith offer. Accordingly, defendants have waived appellate review of the issue, and we lack jurisdiction to consider it[2].

Defendants additionally contend that the trial court abused its discretion in denying their motion for a new trial or additur. In their post-trial motion below, defendants argued

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[1] We acknowledge that in *Travelers Ins Co v Detroit Edison Co,* 465 Mich 185, 204; 631 NW2d 733 (2001), the Court made a general statement that subject matter jurisdiction is not subject to waiver. We do not find *Travelers* dispositive here, however, in light of the *specific statute enacted by the Legislature*, MCL 213.56(6), that limits the Court of Appeals' jurisdiction to consider challenges such as that raised in *Acquisition* and that raised in the instant case.

[2] We note that pursuant to 1996 PA 474, the condemnation statute at issue in this case was amended effective December 26, 1996. Because the instant complaint was filed in October 1996, the amendments are inapplicable. However, all future cases will be governed by these amendments, which essentially bolster the meaning of MCL 213.56(6) by indicating that landowners contending that an offer does not constitute a good-faith offer because of excluded amounts for certain property must challenge the exclusions within a set time period, and if they do not do so, the challenge will be "barred." See current MCL 213.55(3). In light of these amendments that will govern future cases, we find it unnecessary to resolve in a published opinion the specific questions we asked the parties to brief on appeal, as they are unlikely to reappear in the future.

that the jury's verdict was grossly inadequate because it did not include $44,535 necessary to install new driveways. A trial court's decision regarding the grant or denial of additur is accorded deference and will not be reversed on appeal absent an abuse of discretion. *Setterington v Pontiac General Hosp,* 223 Mich App 594, 608; 568 NW2d 93 (1997). In addition, a trial court has discretion in granting a new trial, and this Court "will not interfere absent a palpable abuse of discretion." *Id.*

After carefully reviewing the record below, we discern no error with respect to the denial of additur. Indeed, the trial court noted the parties' stipulation that defendants would accept the jury's verdict as to just compensation and not look to plaintiff to pay for or install new driveways[3]. Moreover, given that the jury's verdict was within the range of evidence and that defendants had ample opportunity to challenge plaintiff's appraisal figures at trial, we cannot conclude that the trial court abused its discretion in denying additur. *Setterington, supra* at 609.

With regard to defendants' remaining issues, we conclude that appellate review has been waived by defendants' failure to object timely during trial. *Napier v Jacobs,* 429 Mich 222, 227-228; 414 NW2d 862 (1987). In *Napier*, the Michigan Supreme Court explained the rationale for timely preservation of issues for appellate review:

> A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal. See *Spencer v Black*, 232 Mich 675; 206 NW 493 (1925) (issue raised for the first time on appeal not properly before the Court); *Molitor v Burns*, 318 Mich 261, 263-265; 28 NW2d 106 (1947) (failure to renew motion for directed verdict at close of

[3] We note that at oral argument counsel for plaintiff informed this Court that plaintiff subsequently agreed to install the new driveways and has in fact done so.

defendant's case waived any error). Generally, to preserve an issue for appellate review, it must be properly raised at trial. *Kinney v Folkerts*, 84 Mich 616, 625; 48 NW 283 (1891) ("[p]arties cannot remain silent, and thereby lie in wait to ground error, after the trial is over, upon a neglect of the court to instruct the jury as to something which was not called to its attention on the trial, especially in civil cases"); *Moden v Superintendents of the Poor*, 183 Mich 120, 125-126; 149 NW 1064 (1914) (statute of limitations defense waived by failure to raise it at trial); *Miller v Cook*, 292 Mich 683, 688-689; 291 NW 54 (1940) (absent proper motion for a directed verdict of negligence as a matter of law, the question cannot be raised on appeal); *Taylor v Lowe*, 372 Mich 282, 284; 126 NW2d 104 (1964) ("counsel may not stand by, electing as we must assume to 'take his chances on the verdict of the jury' [citations omitted] and then raise questions which could and should have been raised in time for corrective judicial action"). The rule is based upon the nature of the adversary process and the need for judicial efficiency. 3 LaFave & Israel, Criminal Procedure,§ 26.5(c), pp 251-252, summarizes the basis for this rule:

"There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong

> when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal." [Quoting *State v Applegate*, 39 Or App 17, 21; 591 P 2d 371 (1979).]

[*Napier, supra* at 227-229.]

While it is true that this Court may review an unpreserved issue to prevent a miscarriage of justice, as noted in *Napier, supra* at 233-234, such review in a civil case is to be exercised "quite sparingly":

> Defendant raises no injustice other than the loss of a favorable jury verdict. While defendant asserts that manifest injustice and a miscarriage of justice would occur if appellate review of the sufficiency of the evidence were denied in the instant case, defendant fails to describe the nature of that injustice. More than the fact of the loss of the money judgment . . . in this civil case is needed to show a miscarriage of justice or manifest injustice. A contrary ruling in the instant case would, in effect, impose a duty in every civil case on the trial judge to review sua sponte the sufficiency of the evidence and to grant unrequested verdicts. Such a rule would be in patent conflict with our adversary system of civil justice. [Footnote omitted.]

We are convinced that no miscarriage of justice will result from our failure to review the unpreserved issues raised on appeal in the instant case. Defendants had ample opportunity

to set forth their case and their damages estimate at trial, and the jury's verdict was within the range of evidence.

Affirmed.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

Dept of Transportation v Carl E Fagerman

Docket No. 223147

LC No. 96-012551-CC

Patrick M. Meter,
Presiding Judge
Jane E. Markey
Donald S. Owens
Judges

The Court orders that the motion for rehearing is DENIED.

/s/
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on SEP 11, 2002

/s/
Chief Clerk

Order

Entered: February 28, 2003

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan, Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman, Justices

122445 & (101)

Department of Transportation, Plaintiff-Appellee,
V
Carl Fagerman and Bertha Fagerman, Defendants-Appellants.

SC: 122445
COA: 223147
Wexford CC: 96-012551-CC

On order of the court, the application for leave to appeal from the July 26, 2002 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to file a reply brief is also considered, and it is DENIED.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 28, 2003 /s/ Corbin R. Davis

Order

Michigan Supreme Court
Lansing, Michigan

Entered: May 30, 2003

Maura D. Corrigan, Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman, Justices

122445 & (104)

Department of Transportation, Plaintiff-Appellee,
V
Carl Edwin Fagerman and Bertha Louise Fagerman,
Defendants-Appellants.

SC: 122445
COA: 223147
Wexford CC: 96-012551-CC

On order of the court, the motion for reconsideration of this Court's order of February 28, 2003 is considered, and it is DENIED because it does not appear that the order was entered erroneously.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 30, 2003 /s/ Corbin R. Davis

APPENDIX B: CONSTITUTIONAL PROVISIONS, STATUTES & REGULATIONS

No State shall enter into any Treaty, Alliance, or Confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

US CONST. art. I, § 10, cl. 1

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

US CONST. art. IV, § 3

This constitution, and the laws of the United States which shall be made in pursuance thereof; all treaties made, or which shall be made, under the authority of the United States, .shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

US CONST, art VI, § 2

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation

US CONST, amend V

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US CONST. amend XIV, §1.

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The Legislature shall implement this section by appropriate legislation.

MICH CONST 1963, art 1, § 2

The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree.

MICH CONST 1963, art 1, § 14

The state shall not be a party to, nor be financially interested in, any work of internal improvement, nor engage in carrying on any such work, except for public internal improvements provided by law.

MICH CONST 1963, art 3, § 6

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title"

MICH CONST 1963, art 4, § 24

No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

MICH CONST 1963, art 4, § 25

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and , in cases in which a hearing is required, whether the same are supported by competent material and substantial evidence on the whole record.

MICH CONST 1963, art 6, § 28

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

MICH CONST 1963, art 10, § 2

The Legislature shall not authorize by private or special law the sale or conveyance of any real estate belonging to any person.

MICH CONST 1908, art 5, § 31

"Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefore being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.

MICH CONST 1908, art 13, § 1

When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: Provided, that the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties.

MICH CONST 1908, art 13, § 2

The Legislature shall not authorize, by private or special law, the sale or conveyance of any real estate belonging to any person.

MICH CONST 1850, art 4, § 23

The property of no person shall be taken by any corporation for public use, without compensation being first made or secured, in such manner as may be prescribed by law.

MICH CONST 1850, art 15 § 9

Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders and actually paid or secured in the manner provided by law.

MICH CONST 1850, art 15, § 15

When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefore, except when to be made by the state, shall be ascertained by a jury of twelve free-holders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of

record, as shall be prescribed by law: Provided, the foregoing provision shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duty as highway commissioners.

MICH CONST 1850, art 18, § 2

The property of no person shall be taken for public use without just compensation therefor. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damages to be sustained by the opening thereof, shall be first determined by a jury of freeholders; and such amount, together with the expenses of proceedings, shall be paid by the person or persons to be benefited.

MICH CONST 1850, art 18, § 14

1980 PA 87, the Uniform condemnation Procedures Act[42]

AN ACT to provide procedures for the condemnation, acquisition, or exercise of eminent domain of real or personal property by public agencies or private agencies; to provide for an agency's entry upon land for certain purposes; to provide for damages; to prescribe remedies; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

213.51 Definitions.

Sec. 1. As used in this act:

(a) "Acquire" or "take" means to secure transfer of ownership of property to an agency by involuntary expropriation.

(b) "Acquisition" or "taking" means the transfer of ownership of property to an agency by involuntary expropriation.

(c) "Agency" means a public agency or private agency.

(d) "Constructive taking" or "de facto taking" means conduct, other than regularly established judicial proceedings, sufficient to constitute a taking of property within the meaning of section 2 of article 10 of the state constitution of 1963.

(e) "Owner" means a person, fiduciary, partnership, association, corporation, or a governmental unit or agency having an estate, title, or interest, including beneficial, possessory, and security interest, in a property sought to be condemned.

(f) "Parcel" means an identifiable unit of land, whether physically contiguous or not, having substantially common beneficial ownership, all or part of which is

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[42] The UCPA is reproduced, as it was effective at the commencement of our court case, October 24, 1996.

being acquired, and treated as separate for valuation purposes.

(g) "Private agency" means a person, partnership, association, corporation, or entity, other than a public agency, authorized by law to condemn property.

(h) "Property" means land, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and property rights whether real, personal, or mixed, including fluid mineral and gas rights.

(i) "Public agency" means a governmental unit, officer, or subdivision authorized by law to condemn property.

213.51a Short title. [M.S.A. 8.265(1a)]

Sec. 1a. This act shall be known and may be cited as "the uniform condemnation procedures act".

213.52 Standards provided; limitations; applicable laws and court rules; commencement of condemnation action; proof of taking of property; certificate of public necessity as condition of instituting judicial proceedings. [M.S.A. 8.265(2)]

Sec. 2.

(1) This act provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation. It does not confer the power of eminent domain, and does not prescribe or restrict the purposes for which or the persons by whom that power may be exercised. All laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in this act.

(2) If property is to be acquired by an agency through the exercise of its power of eminent domain, the agency shall commence a condemnation action for that purpose. An agency shall not intentionally make it necessary for an owner of property to commence an action, including

an action for constructive taking or de facto taking, to prove the fact of the taking of the property.

(3) If a private agency is required by law to secure a certificate of public necessity from the public service commission or other public agency before it may acquire property, the private agency shall not institute judicial proceedings to acquire the property until it has secured the required certificate.

213.53 Fluid mineral and gas rights. [M.S.A. 8.265(3)]

Sec. 3. Fluid mineral and gas rights shall be considered excluded from an instrument by which an agency acquires an interest in land unless specifically included in the instrument. The exercise of the fluid mineral and gas rights, as permitted by law, shall not interfere with the use of the property acquired for a public purpose.

213.54 Payment of just compensation for property if practical value or utility of remainder destroyed; zoning variance; entry upon property; purpose; notice; restitution for actual damages; "actual damage" defined; civil action for order permitting entry; contents of complaint; granting limited license for entry; terms; manner of entry under subsection (3); "environmental inspection" defined.

Sec. 4.

(1) If the acquisition of a portion of a particular parcel of property actually needed by an agency would destroy the practical value or utility of the remainder of that particular parcel, the agency shall acquire the fee to the whole of the particular parcel of property. The agency may elect whether to receive title and possession of the remainder of the parcel. The question as to whether the practical value or utility of the remainder of the parcel of property is in fact destroyed shall be determined by the court or jury and incorporated in its verdict.

(2) An agency or an agent or employee of an agency may enter upon property before filing an action for the purpose of making surveys, measurements, examinations, tests, soundings, and borings; or taking photographs or samplings; or appraising the property; or conducting an environmental inspection; or determining whether the property is suitable to take for public purposes. The entry may be made upon reasonable notice to the owner and at reasonable hours. An entry made pursuant to this subsection shall not be construed as a taking. The owner or his or her representative shall be given a reasonable opportunity to accompany the agency's agent or employee during the entry upon the property. The agency shall make restitution for actual damage resulting from the entry, which may be recovered by special motion before the court or by separate action if an action for condemnation has not been filed. The term "actual damage" as used in this subsection does not include, and an agency shall not make restitution for, response activity, as defined in section 20101 of part 201 (environmental remediation) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.20101 of the Michigan Compiled Laws, or for diminution in the value or utility of a parcel which is caused by the discovery of information as the result of a survey, an appraisal, a measurement, photography, or an environmental inspection made pursuant to this section.

(3) If reasonable efforts to accomplish entry under subsection (2) have been obstructed or denied, the agency may commence a civil action in the circuit court in the county in which the property or any part of the property is located for an order permitting entry. The complaint shall state the facts making the entry necessary, the date on which entry is sought, and the duration and the method proposed for protecting the

defendant against damage. The court may grant a limited license for entry upon such terms as justice and equity require, including the following:

a. A description of the purpose of the entry.
b. The scope of activities that are permitted.
c. The terms and conditions of the entry with respect to the time, place, and manner of the entry.

(4) An entry made pursuant to subsection (3) shall be made in a manner that minimizes any damage to the property and any hardship, burden, or damage to a person in lawful possession of the property.

(5) As used in this section, "environmental inspection" means the testing or inspection including the taking of samples of the soil, groundwater, structures, or other materials or substances in, on, or under the property for the purpose of determining whether chemical, bacteriological, radioactive, or other environmental contamination exists and, if it exists, the nature and extent of such contamination.

213.55 Just compensation; amount; offer; review of appraisal; filing complaint for acquisition; resubmitted offers; documents; claim for additional items of compensable property or damage; contents of complaint; deposit.

Sec. 5.

(1) Except as provided in section 25(4), before initiating negotiations for the purchase of property, the agency shall establish an amount which it believes to be just compensation for the property and promptly shall submit to the owner a good faith offer to acquire the property for the full amount so established. The good faith offer shall state whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the

agency's appraisal of just compensation for the property shall reflect such reservation or waiver. The amount shall not be less than the agency's appraisal of just compensation for the property. The agency shall provide the owner of the property and the owner's attorney with an opportunity to review the written appraisal, if an appraisal has been prepared, or if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as just compensation for the property. If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located. If a parcel of property is situated in 2 or more counties and an owner resides in 1 of the counties, the complaint may be filed in the county in which the owner is a resident. If a parcel of property is situated in 2 or more counties and an owner does not reside in 1 of the counties, the complaint may be filed in any of the counties in which the property is situated. The complaint shall ask that the court ascertain and determine just compensation to be made for the acquisition of the described property. If an agency has made a good faith offer pursuant to this section prior to the effective date of section 6a but has not filed a complaint for acquisition of the property, the agency may withdraw the original offer and resubmit a good faith offer that complies with this act as amended by the amendatory act that added section 6a.

(2) In addition to other allegations required or permitted by law, the complaint shall contain or have annexed to it all of the following:

(a) A plan showing the property to be taken.

(b) A statement of purpose for which the property is being acquired, and a request for other relief to which the agency is entitled by law.

(c) The name of each known owner of the property being taken.

(d) A statement setting forth the time within which motions for review under section 6 shall be filed; the amount which will be awarded and the persons to whom the amount will be paid in the event of a default; and the deposit and escrow arrangements made pursuant to subsection (3).

(e) A declaration signed by an authorized official of the agency declaring that the property is being taken by the agency. The declaration shall be recorded with the register of deeds of each county within which the property is situated. The declaration shall include:

(i) A description of the property to be acquired sufficient for its identification and the name of each known owner.

(ii) A statement of the estate or interest in the property being taken. Fluid mineral and gas rights and rights of access to and over the highway are considered excluded from the rights acquired unless the rights are specifically included.

(iii) A statement of the sum of money estimated by the agency to be just compensation for each parcel of property being acquired.

(iv) Whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property.

(3) At the time the complaint is filed, the agency shall deposit the amount estimated to be just compensation with a bank, trust company, or title company in the business of handling real estate escrows, or with the state

treasurer, municipal treasurer, or county treasurer. The deposit shall be set aside and held for the benefit of the owners, to be disbursed upon order of the court as provided in section 8.

213.56 Challenge by owner; motion to review necessity; hearing; determination by public agency binding on court; judicial determination of public necessity in acquisition by private agency; certificate by public service commission or federal agency as prima facie case; decision of court; final judgment; appeal; conclusive presumption of necessity.

Sec. 6.

(1) Within the time prescribed to responsively plead after service of a complaint, an owner of the property desiring to challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint may file a motion in the pending action asking that the necessity be reviewed. The hearing shall be held within 30 days after the filing of the motion.

(2) With respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion.

(3) Except as otherwise provided in this section, with respect to an acquisition by a private agency, the court at the hearing shall determine the public necessity of the acquisition of the particular parcel. The granting of a permanent or temporary certificate by the public service commission constitutes a prima facie case that the project in furtherance of which the particular parcel would be acquired is required by the public convenience and necessity. The granting of a certificate of public convenience and necessity by the public service commission pursuant to the electric transmission line certification act is binding on the court.

(4) The court shall render a decision within 60 days after the date on which the hearing is first scheduled.

(5) The court's determination of a motion to review necessity is a final judgment.

(6) Notwithstanding section 309 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.309 of the Michigan Compiled Laws, an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable to the court of appeals only by leave of that court pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation.

(7) If a motion to review necessity is not filed as provided in this section, necessity shall be conclusively presumed to exist and the right to have necessity reviewed or further considered is waived.

213.56a Reversal of agency's election of reservation of rights; revised good faith offer; stipulation to reverse agency election and waive cost recovery claim against owner. [M.S.A. 8.265(6a)]

Sec. 6a.

(1) If an agency elects to reserve its rights to bring a state or federal cost recovery claim against an owner, the court upon motion of the owner, which must be filed within the time prescribed to responsively plead after service of a complaint, may reverse that election and order the agency to waive its claims, if the owner establishes by affidavit, and after an evidentiary hearing if requested by the agency in the time prescribed to provide an answer to a motion, 1 or more of the following circumstances exist with respect to the property:

(a) The property is a single family residence and has been used solely for residential purposes.

(b) The property is "agricultural property" as defined in section 3 of the environmental response act, Act No. 307 of the Public Acts of 1982, being section 299.603 of the Michigan Compiled Laws, and the reservation of rights arises out of a release of hazardous substances caused by the application of a fertilizer, soil conditioner, agronomically applied manure, or a pesticide or a combination of these substances according to label directions and according to generally accepted agricultural and management practices, as defined by the Michigan right to farm act, Act No. 93 of the Public Acts of 1981, being sections 286.471 to 286.474 of the Michigan Compiled Laws.

(c) The owner is the only identified potentially responsible party, the extent of contamination and cost of remediation has been reasonably quantified, and the estimated cost of remediation does not exceed the agency's appraised value of the property.

(2) If the court reverses the agency's election of reservation of rights under subsection (1), the agency shall submit to the owner a revised good faith offer. The revised good faith offer shall be considered the good faith offer for purposes of sections 5 and 16.

(3) An agency and an owner may stipulate that the agency will reverse its election and waive its rights to bring a state or federal cost recovery claim against an owner.

213.57 Vesting of title in agency; vesting of right to just compensation; delay or denial.

Sec. 7.

(1) If a motion to review necessity is not filed within the time specified in section 6, the title to the property described in the petition shall vest in the agency as of the date on which the complaint was filed. The right to just

compensation shall then vest in the persons entitled to the compensation and be secured as provided in this act. Title to the property shall also vest in the agency, as provided in this act, if the motion to review necessity is denied after a hearing and after any further right to appeal has terminated.

(2) Neither a motion filed pursuant to section 6a, challenging the agency's decision to reserve its rights to bring federal or state cost recovery actions nor a motion challenging the agency's escrow under section 8 shall delay vesting of title in the agency.

213.58 Payment by escrowee of money deposited; funds remaining in escrow as security for remediation costs; court order; released funds; circumstances; reversal of agency's election under § 213.56a.

Sec. 8.

(1) Except as provided in subsections (3), if a motion for review as provided in section 6 is not filed or is denied and the right to appeal has terminated or if interim possession is granted pursuant to section 9, the court shall order the escrowee to pay the money deposited pursuant to section 5, for or on account of the just compensation that may be awarded pursuant to section 13. However, if the agency reserves its rights to bring a state or federal cost recovery claim against an owner, under circumstances that the court considers just, the court may allow any portion of the money deposited under section 5 to remain in escrow as security for remediation costs of environmental contamination on the condemned parcel. An agency shall present an affidavit and environmental report establishing that the funds placed on deposit pursuant to section 5 are likely to be required to remediate the property. The amount in escrow shall not exceed the likely costs of remediation if the property were used for its highest and best use. Nothing contained in this subsection is intended to limit

or expand an owner's or agency's right to bring federal or state cost recovery claims. Except as provided in subsection (2),, upon the motion of any party, the court shall apportion the estimated compensation among the claimants to the compensation.

(2) Notwithstanding any order entered by the court requiring money deposited pursuant to section 5 to remain in escrow for the payment of estimated remediation costs of contaminated property, the funds in escrow, plus interest, shall be released among the claimants to the just compensation under circumstances that the court considers just, including any of the following circumstances:

(a) The court finds that the applicable statutory requirements for remediation have changed and the amount remaining in escrow is no longer required in full or in part to remediate the alleged environmental contamination.

(b) The court finds that the anticipated need for the remediation of the alleged environmental contamination is not required or is not required to the extent of the funds remaining on deposit.

(c) If the remediation of the property is not initiated by the agency within 2 years of surrender of possession pursuant to section 9 and the agency is unable to show good cause for delay.

(d) The costs actually expended for remediation are less than the estimated costs of remediation or less than the amount of money remaining in escrow.

(e) A court issues an order of apportionment of remediation responsibility.

(3) If the court orders the agency to reverse its election under section 6a(1), the court shall order the escrowee to pay the amount of the revised good faith offer for or on account of the just compensation that may be awarded pursuant to section 13, and to pay the balance of the

escrow to the agency. If the agency seeks possession before the court decides whether to reverse the agency's election or before submitting a revised good faith offer, the agency may request that the court order a portion of the escrow withheld in anticipation of a reduction in the revised good faith offer, with the balance to be paid by the escrowee for or on account of the just compensation that may be awarded pursuant to section 13. If the court denies the request to reverse the agency's election or when the revised good faith offer is submitted, the court shall order the escrowee to pay any unpaid portion of it for or on account of the owner and to pay any balance to the agency.

213.59 Surrender of possession of property to agency; time and terms; enforcement; granting interim possession to private agency; indemnity bond; appeal; liability for damages; repayment as condition of order setting aside determination of public necessity; delay or denial.

Sec. 9.

(1) Upon filing of a complaint and making the deposit as provided in section 5 and after opportunity is given for a person to file a motion for review under section 6 or, if motion for review is filed, upon final determination of the motion, the court shall fix the time and terms for surrender of possession of the property to the agency and enforce surrender by appropriate order or other process. The court also may require surrender of possession of the property after the motion for review filed under section 6 has been heard, determined and denied by the circuit court, but before a final determination on appeal, if the agency demonstrates a reasonable need.

(2) If interim possession is granted to a private agency, the court, upon motion of the owner, may order the private agency to file an indemnity bond in an amount determined by the court as necessary to adequately

secure just compensation to the owner for the property taken.

(3) If an order granting interim possession is entered, an appeal from the order or any other part of the proceedings shall not act as a stay of the possession order. An agency shall be liable for damages caused by the possession if its right to possession is denied by the trial court or on appeal.

(4) Repayment of all sums advanced shall be a condition precedent to entry of a final order setting aside a determination of public necessity.

(5) Neither a motion filed pursuant to section 6a, challenging the agency's decision to reserve its rights to bring federal or state cost recovery actions, nor a motion challenging the agency's escrow under section 8, shall delay the vesting of possession in the agency provided that the court shall not order possession surrendered to the agency before it orders that the escrow be distributed as provided in section 8(1) or (3).

213.60 Order fixing date for hearing. [M.S.A. 8.265(10)]
Sec. 10. Upon filing the complaint, the court shall enter an order fixing a day for a hearing which shall not be less than 21 days after the complaint is served. The order shall recite or have annexed to the order the names of the persons mentioned in the complaint as owners, reasonably describe the property to be taken, state the purpose of the complaint, and order the persons to appear before the court at the time fixed in the order for the hearing on the complaint.

213.61 Scheduling order; exchange of appraisal reports; opportunity for discovery; appraisal report; testimony relating to value of real property; orders to facilitate compliance.
Sec. 11. On the date of the hearing the court shall set a date certain for the pretrial as to parcels not previously disposed of.

213.62 Just compensation; trial by jury. [M.S.A. 8.265(12)]

Sec. 12.

(1) A plaintiff or defendant may demand a trial by jury as to the issue of just compensation pursuant to applicable law and court rules. The jury shall consist of 6 qualified electors selected pursuant to chapter 13 of Act No. 236 of the Public Acts of 1961, as amended, being sections 600.1301 to 600.1376 of the Michigan Compiled Laws, and shall be governed by court rules applicable to juries in civil cases in circuit court.

(2) Unless there is good cause shown to the contrary, there shall be a separate trial as to just compensation with respect to each parcel.

213.63 Just compensation; verdict; division of award. [M.S.A. 8.265(13)]

Sec. 13. The jury or the court shall award in its verdict just compensation for each parcel. After awarding the verdict, on request of any party, the court shall divide the award among the respective parties in interest, whether the interest is that of mortgagee, lessee, lienor, or otherwise, in accordance with proper evidence submitted by the parties in interest.

213.64 Notes and exhibits to assist jury. [M.S.A. 8.265(14)]

Sec. 14. To assist the jury in arriving at its verdict the court may allow the jury when it retires to take with it notes and any map, plan, or other exhibit admitted in the case as an exhibit.

213.65 Interest on judgment amount.

Sec. 15. The court shall award interest on the judgment amount from the date of the filing of the complaint to the date of payment of the amount, or any part of the amount. Interest shall be computed at the interest rate applicable to a federal income tax deficiency or penalty. However, an owner remaining in possession after the date of filing shall be

considered to have waived the interest for the period of the possession. If it is determined that a de facto acquisition occurred at a date earlier than the date of filing, interest awarded pursuant to this section shall be calculated from the earlier date.

213.66 Witness fees and compensation; reimbursement of owner's attorney fees and other expenses.

Sec. 16.

(1) A witness, either ordinary or expert, in a proceeding under this act shall receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial.

(2) If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.

(3) If the amount finally determined to be just compensation for the property acquired exceeds the amount of the written offer as defined in section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5.

(4) Expert witness fees provided for in subsection (1) shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. The agency's liability for expert witness fees shall not be diminished or affected by the failure of the owner to call an expert as a witness if the failure is

caused by settlement or other disposition of the case or issue with which the expert is concerned.

213.67 Discontinuance. [M.S.A. 8.265(17)]

Sec. 17. The agency shall not discontinue the action after the granting of possession or vesting of title to the property taken. In case of a discontinuance, the agency, as a condition of discontinuance, shall pay the actual expenses, reasonable attorney fees, and actual damages to all the parties affected by the discontinuance as determined by the court.

213.68 Reimbursement of expenses in evaluating agency's offer, preparing for trial, or negotiating settlement; enforcement of rights; filing claim.

Sec. 18.

(1) If any agency acquires property without commencement of an action or abandons its efforts to acquire property after making the jurisdictional written offer required by section 5 to the owners of the property and if the owners of the property reasonably relied upon the agency's final action, the owners shall be reimbursed by the agency for the reasonable expenses incurred in evaluating the agency's good faith written offer, in preparing for trial, or in negotiating a settlement, if those expenses would have been taxable as costs under section 16. For the purpose of this section, the jurisdictional written offer shall include only written offers made under threat of institution of judicial proceedings to acquire the property.

(2) The rights created by this section may be enforced in a court having jurisdiction over claims for damages against the agency, or in a court in which an action under this act for the acquisition of the property could have been filed.

(3) The claim for reimbursement of expenses shall be filed within 1 year after the date on which the property is acquired or after the date on which notice of

abandonment of the intention to acquire the property is mailed to the owner.

213.69 Agreement on compensation or method of determining compensation. [M.S.A. 8.265(19)]
Sec. 19. At any stage of the proceedings, the agency and the owner may agree upon all or part of the compensation, or upon a method for determining all or a part of the compensation, and may proceed to have those parts not agreed upon determined as provided in this act. The agency may make payment of a part of the compensation agreed upon, or enter into a contract to pay in the future based upon an agreed method of determining the compensation.

213.70 Determination of fair market value.
Sec. 20. A change in the fair market value before the date of the filing of the complaint which the agency or the owner establishes was substantially due to the general knowledge of the imminence of the acquiring by the agency, other than that due to physical deterioration of the property within the reasonable control of the owner, shall be disregarded in determining fair market value. The property shall be valued in all cases as though the acquisition had not been contemplated. The date of acquiring and of valuation in a proceeding pursuant to this act shall be the date of filing unless the parties agree to a different date, or unless a different date is determined by a counterclaim filed pursuant to section 21. The value of each parcel, and of a part of a parcel remaining after the acquisition of a part of the parcel, shall be determined with respect to the condition of the property and the state of the market on the date of valuation.

213.71 Counterclaim. [M.S.A. 8.265(21)]
Sec. 21. A defendant may assert as a counterclaim, any claim for damages based on conduct by an agency which constitutes a constructive or de facto taking of property.

213.72 Lease, sale, or conveyance of property; terms; record. [M.S.A. 8.265(22)]

Sec. 22. If property is acquired by an agency, the agency may lease, sell, or convey any portion not needed, on whatever terms the agency considers proper. A record of the leases and sales, showing the appraised value, the sale price, and other pertinent information, shall be kept in the office of the agency.

213.73 Enhancement in value as consideration in determining compensation; complaint; compensation; requiring agency to acquire portion claimed to be enhanced; burden of proof. [M.S.A. 8.265(23)]

Sec. 23.

(1) Enhancement in value of the remainder of a parcel, by laying out, altering, widening, or other types of improvement; by changing the scope or location of the improvement; or by either action in combination with discontinuing an improvement, shall be considered in determining compensation for the taking.

(2) When enhancement in value is to be considered in determining compensation, the agency shall set forth in the complaint the fact that enhancement benefits are claimed and describe the construction proposed to be made which will create the enhancement. If the construction is not completed in substantial compliance with the plan upon which the agency based its claim of enhancement benefits, the owner may reopen the question of compensation within 1 year after the termination of construction. If the construction is not in substantial compliance, the owner is entitled to the difference between the value of the property as affected by the actual construction and the value of the property as it would have been, had construction been completed according to plan. The owner shall not recover more compensation than would have been payable if there was not a claim of enhancement benefits.

(3) Upon demand of the owner before trial, the court may require the agency to acquire that portion of the remainder of the tract which the agency claims to be enhanced if the

agency claims enhancement. This subsection shall not apply if the agency withdraws its claim of enhancement benefits before trial.
(4) The agency has the burden of proof with respect to the existence of enhancement benefits.

213.74 Coercive actions prohibited. [M.S.A. 8.265(24)]
Sec. 24. In order to compel an agreement on the price to be paid for the property, an agency may not advance the time of condemnation, defer negotiations or condemnation, defer the deposit of funds for the use of the owner, nor take any other action coercive in nature.

213.75 Commencement of actions for acquisition of property.
Sec. 25.

(1) Except as otherwise provided by subsections (2), (3), and (4), effective May 1, 1980, all actions for the acquisition of property by an agency under the power of eminent domain shall be commenced pursuant to and be governed by this act.

(2) Actions for the acquisition of property by an agency under Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41 of the Michigan Compiled Laws, Act No. 238 of the Public Acts of 1923, as amended, being sections 486.251 to 486.254 of the Michigan Compiled Laws, and Act No. 295 of the Public Acts of 1966, as amended, being sections 213.361 to 213.391 of the Michigan Compiled Laws, may be commenced pursuant to and be governed by this act, effective May 1, 1980.

(3) All actions for the acquisition of property by an agency under Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41 of the Michigan Compiled Laws, and Act No. 295 of the Public Acts of 1966, as amended, being sections 213.361 to 213.391 of the Michigan Compiled Laws, shall be

commenced pursuant to and be governed by this act, effective April 1, 1983.

(4) All actions for the acquisition of property by an agency under Act No. 238 of the Public Acts of 1923, as amended, being sections 486.251 to 486.254 of the Michigan Compiled Laws, shall be commenced pursuant to and be governed by this act, effective April 1, 1985. If such agency initiates negotiations prior to April 1, 1985 for the purchase of property without following the procedure set forth in section 5(1) and does not commence an action to acquire the property under Act No. 238 of the Public Acts of 1923 prior to April 1, 1985, the agency may negotiate after April 1, 1985 for the purchase of the property and may commence an action under this act to acquire the property if the agency first submits the good faith written offer provided in section 5(1).

213.76 Repealer

Sec. 26. The following acts and parts of acts are repealed, effective April 1, 1983:

(a) Sections 6 to 21 of Act No. 149 of the Public Acts of 1911, being sections 213.26 to 213.41 of the Compiled Laws of 1970.

(b) Sections 6 to 30 of Act No. 295 of the Public Acts of 1966, as amended, being sections 213.366 to 213.390 of the Compiled Laws of 1970.

213.77 Repealer

Sec. 27. Sections 2a to 2j of Act No. 238 of the Public Acts of 1923, being sections 486.252a to 486.252j of the Compiled Laws of 1970, are repealed effective April, 1985.

Warrant 40653

The United States of America, To all to whom these presents shall come, Greeting: Whereas, in pursuance of the Act of Congress, approved March 3, 1855, entitled "An Act in addition to certain Acts granting Bounty Land to certain Officers and soldiers who have been engaged in the military service of the United States," there has been deposited in the General Land Office, Warrant No. *40653* for *80* acres, in favor of *Henry B Copeland*[43], *Private Captain Sanders Company, Georgia Militia, War 1812* with evidence that the same has been duly located upon *the West half of the South west quarter of section Ten in Township Twenty two North of Range Nine, West in the District of lands subject to sale at Traverse City, Michigan, containing eighty acres,* according to the Official Plat of the Survey of said Lands returned to the General Land Office by the surveyor general *the said warrant having been assigned by the said Henry B Copeland to Septha (sp?) Boggess, and by him to J Rush Spencer, and by him to Alonzo Chesborough, in whose favor said tract has been located,*

Now know ye, that there is therefore granted by the United States unto the said *Alonzo Chesborough, as assignee, as aforesaid and to his* heirs the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said *Alonzo Chesborough, as assignee, as aforesaid and to his* heirs and assigns forever.

In testimony whereof, I *Ulysses S. Grant* President of the United States of America, have caused these letters to be made patent, and the seal of the General land office to be hereunto affixed. Given under my hand, at the City of Washington, the *tenth* day of January in the year of our Lord one thousand eight hundred and *Seventy*, and of the independences of the United States the *Ninety fourth*. By the President: U S Grant, by *J N Burritt* sec'y. *J N Granger* Recorder of the General Land Office.

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[43] Some of the spellings of the names are unclear.

Warrant 96989

The United States of America, To all to whom these presents shall come, Greeting: Whereas, in pursuance of the Act of Congress, approved March 3, 1855, entitled "An Act in addition to certain Acts granting Bounty Land to certain Officers and soldiers who have been engaged in the military service of the United States," there has been deposited in the General Land Office, Warrant No. *96989* for *160* acres, in favor of *Ishtimishiake*[44], *Widow of Islateatubby Warrior, Captain George Colberts Company, Chickasaw Volunteers, War 1812* with evidence that the same has been duly located upon *the North west quarter of section ten, in Township Twenty two North of Range Nine West in the District of lands subject to sale at Traverse City, Michigan, containing one hundred and sixty acres,* according to the Official Plat of the Survey of said Lands returned to the General Land Office by the surveyor general *the said warrant having been assigned by the said Ishtimishiake to Seth P Bliss and David McIntyal, and by them to Alonzo Chesborough in whose favor said tract has been located,*

Now know ye, that there is therefore granted by the United States unto the said *Alonzo Chesborough, as assignee, as aforesaid and to his* heirs the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said *Alonzo Chesborough, as assignee, as aforesaid and to his* heirs and assigns forever.

In testimony whereof, I Ulysses S. Grant President of the United States of America, have caused these letters to be made patent, and the seal of the General land office to be hereunto affixed. Given under my hand, at the City of Washington, the *tenth* day of January in the year of our Lord one thousand eight hundred and *Seventy*, and of the independences of the United States the *Ninety fourth*. By the President: *U S Grant*, by *J N Burritt* sec'y. *J N Granger* Recorder of the General Land Office.

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[44] Some of the spellings of the names are unclear.

Patent 4688

The United States of America, To all to whom these presents shall come, Greeting: Whereas, *D G Canfield of Erie County New York* has deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at *Traverse City Michigan* whereby it appears that full payment has been made by the said *D G Canfield*[45] according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the Public Lands," for *the South East quarter of the South West quarter of Section Ten in Township twenty two North of Range nine west in the district of lands subject to sale at Traverse City Michigan containing forty acres,* according to the Official Plat of the Survey of said Lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said *D. G. Canfield*

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, Have given and granted, and by these presents do give and grant, unto the said *D G Canfield* and to *his* heirs, the said tract above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said *D G Canfield* and to *his* heirs and assigns forever.

In testimony whereof, I *Ulysses S. Grant* President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the City of Washington, the *tenth* day of *April* in the year of our Lord one thousand eight hundred and *Seventy two*, and of the independences of the United States the *Ninety sixth*. By the President: *U S Grant*, by *J Pur ish (sp?)* secretary. *J R Raynol (sp?)* Recorder of the General Land Office.

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[45] Some of the spellings of the names are unclear.

Patent 4231

The United States of America, To all to whom these presents shall come, Greeting: Whereas, *Alonzo Chesborough*[46] *of Niagana County New York* has deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at *Traverse City Michigan* whereby it appears that full payment has been made by the said *Alonzo Chesborough* according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the Public Lands," for *the North East quarter of the North East quarter, of Section Ten, in Township twenty two North, of Range Nine West, in the district of lands subject to sale at Traverse City Michigan containing forty acres,* according to the Official Plat of the Survey of said Lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said *Alonzo Chesborough.*

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, Have given and granted, and by these presents do give and grant, unto the said *Alonzo Chesborough* and to *his* heirs, the said tract above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said *Alonzo Chesborough* and to *his* heirs and assigns forever.

In testimony whereof, I *Ulysses S. Grant* President of the United States of American, have caused these letters to be made patent, and the seal of the General land office to be hereunto affixed. Given under my hand, at the City of Washington, the *first* day of *October* in the year of our Lord one thousand eight hundred and *Sixty nine*, and of the independences of the United States the *Ninety fourth*. By the President: *U S Grant*, by *J N Burritt* secretary. *J N Granger* Recorder of the General Land Office.

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[46] Some of the spellings of the names and locations are unclear.

April 24, 1820 Act of Congress

An Act making further provision for the sale of the public lands.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the first day of July next, all the public lands of the United States, the sale of which is, or may be authorized by law, shall, when offered at public sale, to the highest bidder, be offered in half quarter sections; and when offered at private sale, may be purchased, at the option of the purchaser, either in entire sections, half sections, quarter sections, or half quarter sections; and in every case of the division of a quarter section, the line for the division thereof shall run north and south, and the corners and contents of half quarter sections which may thereafter be sold, shall be ascertained in the manner, and on the principles directed and prescribed by the second section of an act entitled, " " An act concerning the mode of surv ying the public lands of the United States," passed on the eleventh day of February, eighteen hundred and five; and fractional sections, containing one hundred and sixty acres, or upwards, shall, in like manner, as nearly as practicable, be sub-divided into half quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury; but fractional sections, containing less than one hundred and sixty acres, shall not be divided, but shall be sold entire: *Provided,* That this section shall not be construed to alter any special provision made by law for the sale of land in town lots.

Sec 2. *And be it further enacted,* That credit shall not be allowed for the purchase money on the sale of any of the public lands which shall be sold after the first day of July next, but every purchaser of land sold at public sale thereafter, shall, on the day of purchases, make complete payment therefore; and the purchaser at private sale shall produce, to the register of the land office, a receipt from the treasurer of the United States, or from the receiver of public

moneys of the district, for the amount of the purchase money on any tract, before he shall enter the same at the land office; and if any person, being the highest bidder, at public sale, for a tract of land, shall fail to make payment therefore, on the day on which the same was purchased, the tract shall be again offered at public sale, on the next day of sale, and such person shall not be capable of becoming the purchaser of that or any other tract offered at such public sales.

Sec 3. *And be it further enacted,* That from and after the first day of July next, the price at which the public lands shall be offered for sale, shall be one dollar and twenty-five cents an acre; and at every public sale, the highest bidder, who shall make payment at aforesaid, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than one dollar and twenty-five centers and acre; and all the public land which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid; with the exception, however, of the lands which may have reverted to the united States, for failure in payment, and of the heretofore reserved sections for the future disposal of Congress, in the states of Ohio and Indiana, which shall be offered at public sale, as hereinafter directed.

Sec 4. *And be it further enacted,* That no lands which have reverted, or which shall hereafter revert, and become forfeited to the United States for failure in any manner to make payment, shall, after the first day of July next, be subject to entry at private sale, nor until the same shall have been first offered to the highest bidder at public sale; and all such lands which shall have reverted before the said first day of July next, and which shall then belong to the United States, together with the sections, and parts of sections,

heretofore reserved for the future disposal of Congress, which shall, at the time aforesaid, remain unsold, shall be offered at public sale to the highest bidder, who shall make payment therefore, in half quarter sections, at the land office for the respective districts, on such day or days as shall, by proclamation of the President of the United States, be designated for that purpose; and all lands which shall revert and become forfeited for failure of payment after the said first day of July next, shall be offered in like manner at public sale, at such time, or times as the President shall by his proclamation designate for the purpose; *Provided,* That no such lands shall be sold at any public sales hereby authorized, for a less price than one dollar and twenty-five cents an acre nor on any other terms than that of cash payment; and all the lands offered at such public sales, and which shall remain unsold at the closure thereof, shall be subject to entry at private sale, in the same manner, and at the same price with the other lands sold at private sale, at the respective land offices.

Sec 5. *And be it further enacted,* That the several public sales authorized by this act, shall, respectively, be kept open for two weeks, and no longer; and the registers of the land office and the receivers of public money shall, each, respectively, be entitled to five dollars for each day's attendance thereon.

Sec 6. *And be it further enacted,* That in every case thereafter, where two of more persons shall apply for the purchase, at private sale, of the same tract, at the same time, the register shall determine the preference, by forthwith offering the tract to the highest bidder.

Approved, April 24, 1820.

March 3, 1855 Act of Congress

An Act in addition to certain acts granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That each of the surviving commissioned and non-commissioned officers, musicians, and privates, whether of regulars, volunteers, rangers, or militia, who were regularly mustered into the service of the united States, and every officer, commissioned and non-commissioned, seaman, ordinary seaman, flotilla-man, marine, clerk, and landsman in the navy, in any of the wars in which this country has been engaged since seventeen hundred and ninety, and each of the survivors of the militia, or volunteers, or state troops of any state or territory, called into military service, and regularly mustered therein, and whose services have been paid by the United States, shall be entitled to receive a certificate or warrant from the Department of the Interior for one hundred and sixty acres of land; and where any of those who have so been mustered into service and paid shall have received a certificate or warrant, he shall be entitled to a certificate or warrant for such quantity of land as will make, in the whole, with what he may have heretofore received, one hundred and sixty acres to each such person having served as aforesaid: *Provided,* the person so having been in service shall not receive said land warrant if it shall appear by the muster-rolls of his regiment or corps that he deserted, or was dishonorably discharged from service: *Provided further,* That the benefits of this section shall be held to extend to wagon-masters and teamsters who may have been employed, under direction of competent authority in time of war in the transportation of military stores and supplies.

Sec 2. *And it further enacted,* That in case of the death of any person who, if living, would be entitled to a certificate or warrant as aforesaid under this act, leaving a widow, or, if no

widow, a minor child or children, such widow, or, if no widow, such minor child or children shall be entitled to receive a certificate or warrant for the same quantity of land that such deceased person would be entitled to receive under the provisions of this act, if now living: *Provided,* That a subsequent marriage shall not impair the right of any such widow to such warrant if she be a widow at the time of making her application: *And provided, further,* That those shall be considered minors who are so at the time this act shall take effect.

Sec 3. *And be it further enacted,* That in no case shall any such certificate or warrant be issued for any service less than fourteen days, except where the person shall actually have been engaged in battle, and unless the party claiming such certificate or warrant shall establish his or her right thereto by record evidence of said service.

Sec 4. *And be it further enacted,* That said certificates or warrants may be assigned, transferred, and located by the warrantees, their assignees, or their heirs-at-law, according to the provisions of existing laws regulating the assignment, transfer, and location of bounty-land warrants.

Sec 5. *And be it further enacted,* That no warrant issued under the provisions of this act shall be located on any public lands, except such as shall at the time be subject to sale at either the minimum or lower graduated prices.

Sect 6. *And be it further enacted,* That the registers and receivers of the several land-offices shall be severally authorized to charge, and receive for their services, in locating all warrants under the provisions of this act, the same compensation or percentage to which they are entitled by law, for sales of the public lands, for cash, at the rate of one dollar and twenty-five cents per acre; the said compensation to be paid by the assignees or holders of such warrants.

Sec 7. *And be it further enacted,* That the provisions of this act, and all the bounty-land laws heretofore passed by

Congress, shall be extended to Indians, in the same manner, and to the same extent, as if the said Indians had been white men.

Sec 8. *And be it further enacted,* That the officers and soldieries of the revolutionary war, or their widows or minor children, shall be entitled to the benefits of this act.

Sec 9. *And be it further enacted,* That the benefits of this act shall be applied to and embrace those who served as volunteers at the invasion of Plattsburg, in September, eighteen hundred and fourteen; also at the battle of King's Mountain, in the revolutionary war, and the battle of Nickojock, against the confederated savages of the South.

Sec 10. *And be it further enacted,* That the provisions of this act shall apply to the chaplains who served with the army, in the several wars of the country.

Sec 11. *And be it further enacted,* That the provisions of this act be applied to those who served as volunteers at the attack on Lewistown, in Delaware, by the British fleet, in the war of eighteen hundred and twelve--fifteen.

Approved, March 3, 1855.

March 5, 1875 Act of Congress

An act granting to railroads the right of way through the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the right of way through the public lands of the United states is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres fro each station, to the extent of one station for each ten miles of its road.

Sec 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to

be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided,* That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sec 3. That the legislature of the property territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aide in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Sec 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, it upon un-surveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided,* That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sec 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specifically reserved from sale, unless such right of

way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

Sec 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved, March 3, 1875.

August 1, 1888 Act of Congress

An act to authorized condemnation of land for sites of public buildings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

Sec 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

Approved, August 1, 1888

APPENDIX C: DATE FEDERAL QUESTIONS WERE RAISED.

We raised our sovereignty and our due process rights at the commencement of this action with our attorney; our language at the time did not reflect the legalistic language used in the courts[1]. Our attorney did not relay this information properly to the court.

On or about November 1, 1999, we appealed to the Court of Appeals and directly questioned the violation of our due process rights.[2] On or about March 1, 2001 the question of state sovereignty over our patented lands was presented in the Court of Appeals in our motion for peremptory reversal. On or about August 14, 2002 our motion for rehearing filed with the Court of Appeals challenged MDOT's ability to impair our land patent contracts and the constitutionality of the UCPA. This challenge occurred as a result of the Court's ruling that section six of the act precluded review; we therefore challenged the validity of the act.

On or about October 1, 2002 our application to the Supreme Court for leave to appeal (as wells as our March 20, 2003 motion for rehearing) challenged the constitutionality of the UCPA and raised the issue of the construction of our land patents.

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[1] See our letter to our attorney in appendix D (the next page) dated December 27, 1996 and note that our attorney did not fulfill his contract with us. Throughout the course of the litigation, we instructed our attorney, yet he did not defend us as he was instructed. In our letters to our attorney, we required strict adherence to our guidance and our April 22, 1998 and June 7th, 1999 letters (which are not on record) raised the issue of our sovereignty (over our land) and our due process rights.

[2] Our docketing statement listed three issues: (1) defendants' legal council was inadequate, (2) amount of award for damages is grossly inadequate for evidence, and (3) fundamental requirements of condemnation have not been addressed to allow for condemnation proceedings. This was our first time for representing ourselves in court and our language was extremely non-legal. Our brief filed April 10, 2000 questioned a violation of our due process rights.

APPENDIX D: ANY OTHER MATERIAL ESSENTIAL

9107 E 30 RD
Cadillac, MI 49601
616-775-6390
December 27, 1996

Robert Sheehan
1460 Walton Boulevard
Suite 109
Rochester Hills, MI 48309
PH: (810) 650-5366
Fax: (810) 650-5368

Mr. Sheehan:

RE: CONDEMNATION ACTION REQUIREMENTS

Please find the signed Condemnation Action forms authorizing you to represent us against Michigan Department of Transportation (MDOT).

We have provide a list of expectations to clarify our position. See page 2 of your letter dated December 2, 1996: *"Unless you expressly notify us in writing to the contrary, by signing this agreement, you are giving us authority to consent to the expropriation at any time we deem such consent to be in your best interest."* You may not consent unless the offer meets the attached list of requirements.

Carl was served the *Summons and Complaint* on 12/11/96. Bertha was not served.

The Statement of Necessity is fraudulent! The Good Faith Offer was dated the same day the Statement of Necessity was

filed and it was mailed the following day; Not before! This is a contradiction of fact!

Where are all Mr. Schneider's signatures on all the Summons papers?

If you have any questions or require any additional information, please do not hesitate to contact us.

Sincerely,
Carl and Bertha Fagerman

SUBJECT: Requirements for MDOT Acquisition

1. Retain possession of the property until US 131 highway construction. No one other than those given permission by Carl and Bertha Fagerman are to be allowed on the property. MDOT will need to call and inform us (or someone designated) of any entering of the property; They shall leave, and do nothing, that may damage the health of animals. This extended possession will be free of charge to Carl and Bertha Fagerman.

2. Require adequate lead time to remove barb wire fences and associated cedar posts, trees and buildings. This of course will coincide with item #1 listed above. Property on boundary of MDOT right of way is to be fenced at all times after MDOT takes possession; This will protect the remaining tract A from trespassers (i.e. snowmobilers, hunters, etc.) This fencing will be provided by MDOT.

3. The deed is to state that the property shall revert back to the possession of Carl and Bertha Fagerman (or heirs) if the US 131 highway does not have significant construction on this property within 10 years of signing. The property shall revert back at no cost.

4. Expected nothing less than $3,500.00 per acre. Landlocked property in the same Township, in a neighboring section, within 1/4 mile of this parcel was purchased less than 8 months ago at $3,000.00 per acre. Just compensation should exceed $10,000.00 per acre using an energetic appraiser. [This is in addition to compensation for buildings or damages.]

5. Carl and Bertha Fagerman accept no responsibility for contamination found on the property.

6. Have adequate lead time for removal of timber in US 131 right-of-way (and any other timber deemed necessary for removal by MDOT).

7. Obtain just compensation for lawn and orchard trees and other yard plantings according to Michigan State's damage data.

8. Have guarantee that the wells and hydrants shall not be destroyed or damaged. If removal is necessary, free replacement is required.

9. Have compensation for underground and inlet power and water.

10. Removal expenses for building removal (garages and home) if retained.

11. Have compensation for damages to the four 40 foot culverts.

12. Provide barrier free and easy access entries to both remaining tracts during and after construction. After construction, provide 42 foot entrance, with culvert, that is

level with the drive for the parcel with the remaining buildings.

13. There shall be no use of the existing private drive through the ravine unless paved to Fagerman's requirements and left in excellent condition.

14. No trespassing by any contractors, etc., on either remaining parcels.

15. The temporary road may NOT go through the ponds.

16. Carl and Bertha Fagerman are to retain all mineral rights.

17. Obtain a detailed explanation of use of remaining tracts during construction, prior to signing any agreement. Written proof that no borrow pits will be taken from any of the remaining property.

18. Expect fair compensation for loss of value of all remaining property (acreage, buildings, farm equipment, animals, etc.) This includes the 40 acres not described in tract A, but a part of the whole property.

19. MDOT is to provide protection against trespassers in the form of fences and signs and any other form necessary.

20. Require a detailed explanation of ingress and egress from 30 Mile Road. This must be in writing with diagrams and discussed in person.

21. Since this is an involuntary conversion, there must be compensation for IRS requirements (tax on capital gains). We will not pay the taxes for this transaction, MDOT will have to account for this and pay it themselves.

Elaine L. Richardson
WEXFORD COUNTY CLERK
437 E. Division Street
Cadillac, Michigan 49601
Telephone: (231) 779-9450
Fax: (231) 779-0447

June 17, 2003

Mary Graddick
Office of the Attorney General
Transportation Division
Transportation Building
425 West Ottawa
PO Box 30050
Lansing MI 48909

Re: *MDOT v Carl and Bertha Fagerman*
Wexford County Circuit Court No. 96-0126551-CC

Dear Ms. Graddick:

The Michigan Department of Transportation (MDOT) filed this eminent domain case in the Wexford County Circuit court on October 24, 1996. During the course of the judicial proceedings, Judge Corwin and Judge Horn each entered orders that required MDOT to make payments of just compensation to the Court's escrow account on behalf of the Fagermans until such time as the Fagermans provided tax information to MDOT or the court Clerk. Judge Horn also ordered that we return a portion of this amount to you as a result of case evaluation sanctions imposed upon the Fagermans in 1999, and we have done so.

Currently, the balance in the Court's escrow account is $210,553.34. We have been advised that the Fagermans have

exhausted their appeals and there will be no further proceedings in this case (i.e., File No. 96-012551-CC). As a result, it is no longer appropriate for the Clerk's Office to retain the unclaimed funds associated with this case. Accordingly, enclosed is a check made payable to the Michigan Department of Transportation in the amount of $210,553.34, which represent s the total balance of fund being held in escrow on behalf of the Fagermans. We understand that the Department of Transportation will remit the funds to the Michigan Department of Treasury, where the Fagermans may make a claim to the funds in the manner and within the time limits provided by law.

If you have any questions, please contact me. Thank you for your courtesy and assistance.

Sincerely,
/s/ Elaine L. Richardson
Wexford County Clerk

/ELR
Enc
cc: Carl and Bertha Fagerman (w/o enclosure)
Lawrence P. Schneider (w/o enclosure)